Supreme Court, U.S.
FILED

10-573 OCT 28 2010

OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

SHEPHERD MONTESSORI CENTER MILAN,
Petitioner,

v.

ANN ARBOR CHARTER TOWNSHIP, ANN ARBOR CHARTER TOWNSHIP ZONING OFFICIAL, AND ANN ARBOR CHARTER TOWNSHIP ZONING BOARD OF APPEALS,
Respondents.

On Petition for Writ of Certiorari to the Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

ROBERT CHARLES DAVIS
ATTORNEY AT LAW
10 S. MAIN ST., SUITE 401
MT. CLEMENS, MI 48043
(586) 469-4300
rdavis@davislistman.com

Co-Counsel for Petitioner

ROBERT L. BUNTING
Counsel of Record
ATTORNEY AT LAW
P.O. BOX 7
OXFORD, MI 48371
(248) 628-5150
lciseadog@yahoo.com

Counsel for Petitioner

October 28, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

I. Whether the Michigan Supreme Court erred when it ruled that the Defendants Ann Arbor Charter Township, Ann Arbor Charter Township Zoning Official, and Ann Arbor Charter Township Zoning Board of Appeals, ("Defendants') did not violate the Equal Protection Guarantee of the Fourteenth Amendment to the United States Constitution in direct conflict with this United States Supreme Court's Opinion in *City of Cleburne v. Cleburne Living Ctr, Inc.*, 473 US 432, 87 L.Ed.2d 313, 105 S. Ct. 3249 (1985) thereby destroying Equal Protection in the State of Michigan.

STATEMENT OF PARTIES

Petitioner

Shepherd Montessori Center Milan.

Respondents

Ann Arbor Charter Township, Ann Arbor Charter Township Zoning Official, and Ann Arbor Charter Township Zoning Board of Appeals.

RULE 29.6 STATEMENT

Petitioner, Shepherd Montessori Center Milan, has no parent company, and no public company has any ownership interest in it.

TABLE OF CONTENTS

QUESTION PRESENTED i

STATEMENT OF PARTIES ii

RULE 29.6 STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES ix

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 3

CONSTITUTIONAL PROVISIONS INVOLVED . 4

STATEMENT OF THE CASE 4

I. Background Facts 4

II. First Decision of the Washtenaw County Circuit Court. 7

III. First Decision of the Michigan Court of Appeals. 7

IV. Second Decision of the Washtenaw County Circuit Court. 8

V. Second Decision of the Michigan Court of Appeals. 8

VI. First Decision of the Michigan Supreme Court. 9

VII. Third Decision of the Michigan Court of Appeals. 9

VIII. Second Decision of the Michigan Supreme Court. 10

REASONS FOR GRANTING THE PETITION . . 11

I. The Michigan Supreme Court's Opinion Conflicts With This United State Supreme Court's Opinion in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 US 432; 87 L.Ed.2d 313; 105 S. Ct. 3249 (U.S. Tex. 1985) Thereby Destroying Equal Protection in Michigan. 11

A In Conflict with *Cleburne*, the Michigan Supreme Court Did Not Find the Plaintiff Similarly Situated to Rainbow Rascals. 19

B In Conflict With *Cleburne*, There Was No Rational Reason For The Plaintiff To Be Treated Differently From Rainbow Rascals. 24

II. The Question Presented Is Important 30

III. The Decision Of The Michigan Supreme Court Is Erroneous 30

CONCLUSION 31

APPENDIX

Appendix A: Opinion, Michigan Supreme Court (June 18, 2010) 1a

Appendix B: Order, Michigan Supreme Court (July 9, 2009) 22a

Appendix C: Opinion on remand, State of Michigan Court of Appeals (August 26, 2008) 24a

Appendix D: Order, Michigan Supreme Court (March 28, 2008) 32a

Appendix E: Order, State of Michigan Court of Appeals (August 21, 2007) 35a

Appendix F: Order denying rehearing, State of Michigan Court of Appeals (July 13, 2007) 37a

Appendix G: Opinion, State of Michigan Court of Appeals (May 22, 2007) 39a

Appendix H: Opinion and Order granting defendants' motion for summary disposition and denying plaintiff's motion for summary disposition, State of Michigan In the Circuit Court for the County of Washtenaw (July 26, 2006) 59a

Appendix I: Order, Michigan Supreme Court (September 16, 2004) 89a

Appendix J: Opinion, State of Michigan Court of Appeals (November 6, 2003) 91a

Appendix K: Unpublished Opinion, Michigan Circuit Court (March 13, 2001) 125a

Appendix L: Order denying rehearing, Michigan Supreme Court (August 2, 2010) 165a

Appendix M: U.S. Constitution, Amendment XIV (July 16, 1868) 167a

Appendix N: Letter, from Paul Roney, Domino's Farms President to Ann Arbor Township Zoning Board of Appeals Officials (includes fold-out exhibit) (June 2, 2000) 169a

Appendix O: Zoning Variance Application (May 30, 2000) 171a

Appendix P: Zoning Ordinances 184a

Appendix Q: Minutes, Ann Arbor Township Zoning Board of Appeals (December 3, 1991) 209a

Appendix R: Website, Rainbow Rascals ... 211a

Appendix S: Letter, from Gary Dresselhouse, Ann Arbor Township Zoning Official, to Van Belanger, Domino's Farms (May 1, 2000) 216a

Appendix T: Minutes, Ann Arbor Township Zoning Board of Appeals (June 28, 2000) 218a

Appendix U: Defendant's response to Plaintiff's first request for admissions, State of Michigan In the Circuit Court for the County of Washtenaw (May 17, 2005) 228a

TABLE OF AUTHORITIES

CASES

City of Cleburne, Tex. v. Cleburne Living Center,
473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313
(U.S. Tex. 1985) 11-22, 24-25, 27-30

Engquist v. Oregon, Dep't of Agr.,
128 S.Ct. 2146,
170 L.Ed.2d 975 (U.S. 2008) 23, 24

F.S. Royster Guano Co. v. Commonwealth of Virginia,
253 U.S. 412, 40 S.Ct. 560 (U.S. 1920) 23

Greater Bible Way Temple of Jackson v. City of Jackson,
478 Mich. 373, 733 N.W.2d 734 (2007) 9

Lawrence v. Texas,
539 U.S. 558, 123 S.Ct. 2472 (U.S. 2003) 19

Perry v. McGinnis,
209 F.3d 597 (6th Cir. 2000) 20

Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp.,
___ Mich. ___, 784 N.W.2d 825 (2010) 1, 11

Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp.,
486 Mich. 311,
783 N.W.2d 695 (2010) 1, 3, 10, 11, 12

Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp.,
483 Mich. 1131, 767 N.W.2d 451 (2009) 3

Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp.,
480 Mich. 1143, 746 N.W.2d 105 (2008) 2, 9

Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp.,
471 Mich. 877, 688 N.W.2d 499 (2004) 1, 7

Shepherd v. Ann Arbor,
259 Mich. App. 315, 675 N.W.2d 271 (2003) 1, 7

Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp.,
275 Mich. App. 597, 739 N.W.2d 664 (2007) . 2, 8

Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp.,
280 Mich. App. 449,
761 N.W.2d 230 (2008) 3, 10

Village of Willowbrook v. Olech,
528 U.S. 562, 120 S.Ct. 1073,
145 L.Ed.2d 1060 (U.S. 2000) 29

STATUTES

28 USCA Sec. 1257(a) 4

28 USCA Sec. 2101(c) 4

42 USCA Sec. 2000 cc 7

COURT RULES

Sup. Ct. R. 13.1 4

Sup. Ct. R. 13.3 4

MCR 7.211 8

MCR 7.216 8

OTHER AUTHORITIES

U.S. Const., 14th Amend. 4, 23, 27, 30

PETITION FOR A WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Supreme Court, Shepherd Montessori Center Milan ("Plaintiff") prays that a Writ of Certiorari be issued to review the decision entered by the Michigan Supreme Court. (*Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp.*, 486 Mich. 311, 783 N.W.2d 695 (2010).) (App. A, 1a-21a) and (*Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp.*, __ Mich. __, 784 N.W.2d 825 (2010).) (App. L, 165a-166a).

OPINIONS BELOW

The Washtenaw County Circuit Court Opinion and Order dated March 13, 2001 granting summary disposition to the Defendants and dismissing the Plaintiff's Complaint in whole. (Washtenaw County Circuit Court Opinion and Order.) (*App. K*, 125a-164a)

The Michigan Court of Appeals Opinion dated November 6, 2003, reversing the Washtenaw County Circuit Court's Opinion and Order Dated March 13, 2001 and remanding to the Washtenaw County Circuit Court. *(Shepherd v. Ann Arbor, (App. J,* 91a-124a*) which is reported at* 259 Mich. App. 315, 675 N.W.2d 271 (2003).)

The Michigan Supreme Court's Order dated September 16, 2004 denying the Defendants' application for leave to appeal. (*Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., (App. I,* 89a-90a) *which is reported at* 471 Mich. 877, 688 N.W.2d 499 (2004).)

The Washtenaw County Circuit Court Opinion and Order dated July 26, 2006, granting the Defendants' Motion for Summary Disposition, and denying the Plaintiff's Motion for Summary Disposition. (Washtenaw County Circuit Court Opinion and Order, (*App. H*, 59a-88a).)

The Michigan Court of Appeals Opinion dated May 22, 2007, reversing the Trial Court's Opinion and Order dated July 26, 2006 and finding that the Trial Court should have granted summary disposition to the Plaintiff on the RLUIPA claim, Equal Protection claim, and ZBA appeal. (*Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp.*, *(App. G,* 39a-58a*) which is reported at* 275 Mich. App. 597, 739 N.W.2d 664 (2007).)

The Michigan Court of Appeals Order dated July 13, 2007 denying the Defendant's Motion for Reconsideration. (Michigan Court of Appeals Order) *(App. F,* 37a-38a*)*

The Michigan Court of Appeals Order dated August 21, 2007 finding the Defendant's Motion for Reconsideration vexatious. (Michigan Court of Appeals Order) *(App. E,* 35a-36a*)*

The Michigan Supreme Court's Order dated March 28, 2008 remanding the case to the Michigan Court of Appeals to consider in light of the Michigan Supreme Court's Opinion in *Greater Bible Way Temple of Jackson v. City of Jackson*, 478 Mich. 373, 733 N.W.2d 734 (2007). (*Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp.*, *(App. D,* 32a-34a*) which is reported at* 480 Mich. 1143, 746 N.W.2d 105 (2008).)

The Michigan Court of Appeals Opinion dated August 26, 2008 dismissing the Plaintiff's RLUIPA claim and finding a violation of the Equal Protection Guarantee. (*Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp., (App. C,* 24a-31a*) which is reported at* 280 Mich. App. 449, 761 N.W.2d 230 (2008).)

The Michigan Supreme Court's Order dated July 9, 2009 granting the Defendants Application For Leave to Appeal. (*Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp., (App. B,* 22a-23a*) which is reported at* 483 Mich. 1131, 767 N.W.2d 451 (2009).)

The Michigan Supreme Court's Opinion dated June 18, 2010 reversing the Michigan Court of Appeals Opinion dated August 26, 2008 and finding no violation of Equal Protection. (*Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp., (App. A,* 1a-21a*) which is reported at* 486 Mich. 311, 783 N.W.2d 695 (2010).)

The Michigan Supreme Court's Order dated August 2, 2010 denying the Plaintiff's Motion for Rehearing. (*Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp., (App. L ,*165a-166a*) which is reported at* __ Mich. __, 784 N.W.2d 825 (2010).)

JURISDICTION

The Michigan Supreme Court's Opinion sought to be reviewed was entered on June 18, 2010 (*Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp.*, 486 Mich. 311, 783 N.W.2d 695 (2010) (App. A , 1a-21a) and the Michigan Supreme Court's Order denying the Plaintiff's Motion for Rehearing was entered on August 2, 2010. (*Shepherd Montessori Ctr. Milan v. Ann Arbor*

Charter Tp., __ Mich. __, 784 N.W.2d 825 (2010).) (App. L, 165a-166a) This petition is timely under 28 U.S.C. Sec. 2101(c) and Supreme Court Rule 13.1 and 13.3 because it is being filed within 90 days of the Order denying rehearing. This United States Supreme Court has jurisdiction to review the Michigan Supreme Court's Opinion pursuant to 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant Constitutional provision involved is the Fourteenth Amendment to the United States Constitution which provides: "**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (United States Constitution Amendment IV.) *(App. M, 167a-168a)* The Fourteenth Amendment to the United States Constitution is reproduced at Appendix M. *(App. M, 167a-168a)*

STATEMENT OF THE CASE

I. Background Facts.

1. The Plaintiff is a not-for-profit corporation and conducts religious educational services using the well established Montessori program. The Plaintiff maintained a written Lease Agreement with Domino Farms Office Park, L.L.C. and sought to lease an additional 1,902 square feet immediately across the

hall from the Plaintiff's existing Montessori program (hereinafter the "Property"). (App. N, 169a-170a)

2. The Plaintiff sought to use the Property to continue and extend the existing Catholic Montessori religious (faith based) education for 25 young children as those children progressed through the next levels of Montessori instruction being the equivalent of traditional school grades 1 - 3. (App. O, 171a-183a) (App. Q, 209a-210a)

3. The Property across the hallway is zoned OP (office park district), the same as the Plaintiff's current space (*App. P*, 184a-208a). This same exact Property was previously **approved** and expressly allowed by the Defendants as a secular "day care facility" for up to 100 children and used for that purpose for multiple years by another organization known as Rainbow Rascals ("Rainbow Rascals"). (App. T, 218a-227a)

4. Rainbow Rascals is a child development center which, just like the Plaintiff, provides young children with education in reading, mathematics, science, social studies, computer and even a foreign language. (App. R, 211a-215a)

5. Instead of asking to use the Property for up to 100 children, the Plaintiff limited its request to use the Property for only 25 children as those students progressed to the next functional levels of the Montessori religious education. (App. O, 171a-183a)

6. Pursuant to the Defendants Ordinance, the Plaintiff first sought a ruling from the Defendants on whether the Plaintiff's proposed use of the Property across the hall is allowed. Much to the surprise of the

Plaintiff, the Defendants' Zoning Official flatly denied the Plaintiff by letter dated May 1, 2000. (App. S, 216a-217a)

7. On May 30, 2000, the Plaintiff, pursuant to the Ordinance (Section 24.04), and with the express written authority of the Property owner, appealed to the Defendant ZBA by written petition seeking a reversal of the Zoning Official's ruling dated May 1, 2000, a substitution of use provided for under the Ordinance scheme and, in the alternative, a variance from the Ordinance as necessary to allow the Plaintiff's proposed use of the Property. The ZBA conducted a hearing on Plaintiff's request. Despite public notices, no member of the public appeared at the public hearing and no member of the public raised any objection in writing or otherwise. (App. T, 218a-227a)

8. As presented at the scheduled hearing before the Defendant ZBA, the Plaintiff's proposed use of the Property is low impact and involves less students (100 down to 25) than the previously approved use of the same Property for Rainbow Rascals. (App. T, 218a-227a). The Property use requested by the Plaintiff had no alleged or demonstrated detrimental impact on the land, environment, water, sanitation, traffic or any other aesthetic concern. Despite this, the Defendant ZBA refused to allow the Plaintiff's use, to substitute the use under its Ordinance scheme, and refused to grant any variance relief whatsoever to the Plaintiff to allow for the use of the Property. The Plaintiff filed suit against the Defendants. This suit included claims for violations of the Religious Land Use and Institutionalized Persons Act, 42 USC Sec 2000cc ("RLUIPA"), Equal Protection and a ZBA appeal.

II. First Decision of the Washtenaw County Circuit Court.

9. On March 13, 2001, the Trial Court issued an Opinion and Order granting Defendants' Motion for Summary Disposition, dismissing the Plaintiff's entire case and denying Plaintiff's Motion for Summary Disposition and Preliminary Injunction. (Washtenaw County Circuit Court Opinion and Order.) *(App. K, 125a-164a)*

III. First Decision of the Michigan Court of Appeals.

10. On November 6, 2003, the Michigan Court of Appeals reversed and remanded. The Michigan Court of Appeals ruled that the Trial Court erred in dismissing the Plaintiff's RLUIPA claim, Equal Protection claim and the ZBA appeal. *(Shepherd v. Ann Arbor*, 259 Mich. App. 315, 675 N.W.2d 271 (2003).) *(App. J, 91a-124a)*

11. The Defendants filed an application for leave to appeal to the Michigan Supreme Court which sought to appeal the Michigan Court of Appeals' Opinion dated November 6, 2003. On September 16, 2004, the Michigan Supreme Court issued an Order denying the application. (*Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp.*, 471 Mich. 877, 688 N.W.2d 499 (2004).) *(App. I , 89a-90a)*

IV. Second Decision of the Washtenaw County Circuit Court.

12. On July 26, 2006, the Trial Court issued an Opinion and Order which granted the Defendants' Motion for Summary Disposition and denied the Plaintiff's Motion for Summary Disposition. (Washtenaw County Circuit Court Opinion and Order.) (App. H, 59a-88a)

V. Second Decision of the Michigan Court of Appeals.

13. On May 22, 2007, the Michigan Court of Appeals ruled that the Trial Court should have granted summary disposition to the Plaintiff on the RLUIPA claim and the Plaintiff's Equal Protection claim. (*Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp.*, 275 Mich. App. 597, 739 N.W.2d 664 (2007).) (App. G, 39a-58a)

14. On July 13, 2007, the Michigan Court of Appeals issued an Order Denying the Defendants' Motion for Reconsideration. (Michigan Court of Appeals Order) (App. F, 37a-38a)

15. On July 19, 2007, the Plaintiff filed a Motion to Deem Defendants' Motion for Reconsideration Vexatious Pursuant to MCR 7.211(C)(8) and MCR 7.216(C). On August 21, 2007, the Michigan Court of Appeals entered an Order granting the relief sought by the Plaintiff. (Michigan Court of Appeals Order) (App. E, 35a-36a)

VI. First Decision of the Michigan Supreme Court.

16. On August 24, 2007, the Defendants filed another application with the Michigan Supreme Court. On March 28, 2008, the Michigan Supreme Court vacated the Michigan Court of Appeals 2007 Opinion and remanded the case to the Michigan Court of Appeals for reconsideration of the RLUIPA claim in light of the Michigan Supreme Court's ruling in *Greater Bible Way Temple of Jackson v. City of Jackson*, 478 Mich. 373; 733 N.W.2d 734 (2007). (*Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp.*, 480 Mich. 1143, 746 N.W.2d 105 (2008).) (App. D, 32a-34a) The Michigan Supreme Court left undisturbed the prior rulings on Equal Protection.

VII. Third Decision of the Michigan Court of Appeals.

17. On August 26, 2008, the Michigan Court of Appeals ruled that the Michigan Supreme Court's ruling in *Greater Bible Way* destroyed Plaintiff's RLUIPA claim. The Michigan Court of Appeals ruled that the Defendants' application of the zoning ordinance violated the Plaintiff's Equal Protection guarantee and that in light of this violation, the Defendant Ann Arbor Charter Township Zoning Board of Appeals decision was contrary to law.

> "Accordingly, though the Supreme Court's holding in *Greater Bible Way* compels us to affirm the trial court's grant of summary disposition to defendants on plaintiff's RLUIPA claim, we reaffirm our holding that the application of the zoning ordinance violated the

equal protection guarantee of the United States Constitution." (*Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp.*, 280 Mich. App. 449, 456, 761 N.W.2d 230, 234 (2008).) (App. C at 30a-31a)

VIII. Second Decision of the Michigan Supreme Court.

18. On July 9, 2009, the Michigan Supreme Court granted leave on the Equal Protection issue. While the Plaintiff contended that it was treated 100% differently from Rainbow Rascals, the Michigan Supreme Court, on June 18, 2010, ruled that the Defendants' denial of the Plaintiff's use of the Property did not violate Equal Protection because, according to the Michigan Supreme Court, the Plaintiff was not treated differently from other similarly situated entities.

> "**We hold that defendants' denial of plaintiff's variance request does not violate equal protection principles because plaintiff has not met the threshold burden of proof for its equal protection challenge by showing disparate treatment of similarly situated entities, nor has plaintiff demonstrated that the variance was denied because of religious animus.** Accordingly, we reverse the Court of Appeals judgment and reinstate the trial court's order granting defendants' motion for summary disposition." (*Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp.*, 486 Mich. 311, 328-329, 783 N.W.2d 695, 703 (2010).) (App. A at 20a)

19. On August 2, 2010, the Michigan Supreme Court denied the Plaintiff's Motion for Rehearing. (*Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp.*, __ Mich. __, 784 N.W.2d 825 (2010).) (App. L , 165a-166a)

20. This serves as the Plaintiff's Petition for Writ of Certiorari to this United States Supreme Court.

REASONS FOR GRANTING THE PETITION

I. The Michigan Supreme Court's Opinion Conflicts With This United States Supreme Court's Opinion in *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.* 473 U.S. 432; 87 L.Ed.2d 313; 105 S.Ct. 3249 (U.S. Tex. 1985) Thereby Destroying Equal Protection In Michigan.

The Michigan Supreme Court ruled that, in order to determine whether Plaintiff's Equal Protection rights were violated, the Michigan Supreme Court has to first make the threshold inquiry of whether the Plaintiff was treated differently from a "similarly situated entity".

> "In order to determine whether plaintiff's **equal protection rights were violated, we begin by analyzing the threshold inquiry for an equal protection challenge, that being whether plaintiff was treated differently from a similarly situated entity**. Plaintiff asserts that Rainbow Rascals and plaintiff are similarly situated and that defendants treated them differently." (*Shepherd Montessori Ctr.*

> *Milan v. Ann Arbor Charter Tp.*, 486 Mich. 311, 320, 783 N.W.2d 695 (2010), (App. A at 12a-13a).) (Emphasis Added)

In support of this "threshold" analysis, the Michigan Supreme Court initially and properly cited to this United States Supreme Court's ruling in *City of Cleburne v. Cleburne Living Ctr, Inc.*, 473 US 432, 87 L.Ed.2d 313, 105 S. Ct. 3249 (1985).

> "The Equal Protection Clause requires that all persons similarly situated be treated alike under the law.[FN8]
>
> FN8. *City of Cleburne v. Cleburne Living Ctr, Inc*, 473 U.S. 432, 439; 105 S Ct 3249; 87 L.Ed.2d 313 (1985)."
>
> (*Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp.*, 486 Mich. 311, 318, 783 N.W.2d 695 (2010), (App. A at 7a-8a).)

The Michigan Supreme Court then ruled that the Defendants' denial of the Plaintiff's use of the Property did not violate Equal Protection because according to the Michigan Supreme Court the Plaintiff was not treated differently from other similarly situated entities. Again, there is only one Property at issue. For many years, it was approved by the Defendants to educate 100 children on a daily basis under a secular operation. During those same years, the Plaintiff occupied the space -- in the same building -- across the hall and used it for a faith based Montessori education program. When the secular user, Rainbow Rascals, vacated the space, the Plaintiff simply requested to extend its existing use across the hall. As

demonstrated in the record, no changes to the space, the plumbing, the utilities or the parking were required. Again, no member of the public objected. Thus, there is utterly no health, safety or welfare factor to deny this proposed use of the Property. The Michigan Supreme Court's ruling wholly conflicts with *Cleburne*.

In *Cleburne*, this United States Supreme Court noted that the constitutional question presented focused on the fact that the defendant city did not require a special use permit in an R-3 zone for boarding houses and hospitals but did require a special permit for a home for the mentally retarded. Thus, the treatment of the home sought for the mentally retarded was different leaving the underlying Court to first decide if the uses, although distinguished by a local government ordinance scheme, were in fact "similar". Thus, it was the actual uses that postured the question of similarly situated.

> "The constitutional issue is clearly posed. **The city does not require a special use permit in an R-3 zone for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged** (other than for the insane or feebleminded or alcoholics or drug addicts), private clubs or fraternal orders, and other specified uses. **It does, however, insist on a special permit for the Featherston home, and it does so, as the District Court found, because it would be a facility for the mentally *448 retarded. May the city**

> **require the permit for this facility when other care and multiple-dwelling facilities are freely permitted?"** (*City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 447-448, 105 S.Ct. 3249, 3258 (U.S. Tex. 1985).) (Emphasis Added)

In *Cleburne*, this United States Supreme Court ruled that, in general, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. In other words, zoning ordinances which distinguish uses are sustained as long as there exists a legitimate interest.

> **"The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."** (*City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254 (U.S. Tex. 1985) (Emphasis Added)

This United States Supreme Court further ruled that, although the mentally retarded as a group are different from others not sharing their misfortune, this difference is largely irrelevant **unless** the *Cleburne* facility would threaten legitimate interests of the defendant in a way that other permitted uses such as boarding houses and hospitals would not. Thus, the analysis goes farther than simply looking at the face of the zoning categories as set up by local governments.

> "[11] It is true, as already pointed out, that the mentally retarded as a group are indeed different from others not sharing their

> misfortune, and in this respect they may be different from those who would occupy other facilities that would be permitted in an R-3 zone without a special permit. **But this difference is largely irrelevant unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not.**" (*City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 447-448, 105 S.Ct. 3249, 3258 (U.S. Tex. 1985).)

This United States Supreme Court examined each of the rational basis reasons argued by the defendant in *Cleburne* and systematically rejected each one.

First, this United States Supreme Court focuses on the *Cleburne* defendants concern over the negative attitude of the majority of property owners located adjacent to the facility. This United States Supreme Court rejected this argument concerning negative attitudes.

> "**First**, the Council was concerned with the **negative attitude of the majority of property owners **3259 located within 200 feet of the Featherston facility, as well as with the fears of elderly residents of the neighborhood. But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like.** It

> is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736-737, 84 S.Ct. 1459, 1473-1474, 12 L.Ed.2d 632 (1964), and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421 (1984)." (*City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 105 S.Ct. 3249, 3258 - 3259 (U.S. Tex. 1985).)

Second, this United States Supreme Court rejected concerns over the fact that the *Cleburne* facility was located across the street from a junior high school and was otherwise located on a flood plain.

> "**Second**, the Council had two objections to the location of the facility. **It was concerned that the facility was across the street from a junior high school, and it feared that the students might harass the occupants of the Featherston home**. But the school itself is attended by about 30 mentally retarded students, and denying a permit based on **such vague, undifferentiated fears is again permitting some portion of the community to validate what would otherwise be an equal protection violation**. The other objection to the home's location was that it was located on "a **five hundred year flood plain**."

> This concern with the possibility of a flood, however, can hardly be based on a distinction between the Featherston home and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit." (*City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 105 S.Ct. 3249, 3258 - 3259 (U.S. Tex. 1985).)

Third, this United States Supreme Court rejected concerns over the legal responsibility for actions which the mentally retarded might take.

> "The same may be said of another concern of the Council-doubts about the legal responsibility for actions which the mentally retarded might take. If there is no concern about legal responsibility with respect to other uses that would be permitted in the area, such as boarding and fraternity houses, it is difficult to believe that the groups of mildly or moderately mentally retarded individuals who would live at 201 Featherston would present any different or special hazard." (*City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 449, 105 S.Ct. 3249, 3259 (U.S. Tex. 1985).)

Finally, this United States Supreme Court rejected concerns regarding the size of the facility.

> "**Fourth, the Council was concerned with the size of the home and the number of people that would occupy it.** The District Court found, and the Court of Appeals repeated,

that "[i]f the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance." App. 93; 726 F.2d, at 200. Given this finding, there would be no restrictions on the number of people who could occupy this home as a boarding house, nursing home, family dwelling, fraternity house, or dormitory. The question is whether it is rational to treat the mentally retarded differently. It is true that they suffer disability *450 not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent. At least this record does not clarify how, in this connection, the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes." (*City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 449-450, 105 S.Ct. 3249, 3259 (U.S. Tex. 1985).)

This United States Supreme Court ruled that, because the record did not reveal any rational basis for believing that the *Cleburne* facility would pose any special threat to the defendant city's legitimate interest, the judgment below holding the ordinance invalid as applied was affirmed.

"Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below

> **insofar as it holds the ordinance invalid as applied in this case.**" (*City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 447-448, 105 S.Ct. 3249, 3258 (U.S. Tex. 1985).)

In 2003, this United States Supreme Court again noted that, in *Cleburne,* it ruled that it was irrational for a State to require a home for the mentally disabled to obtain a special use permit when other residences like fraternity houses did not have to obtain such a permit.

> "Likewise, in *Cleburne v. Cleburne Living Center, supra,* we held that it was irrational for a **State to require a home for the mentally disabled to obtain a special use permit when other residences-like fraternity houses and apartment buildings-did not have to obtain such a permit.**" (*Lawrence v. Texas,* 539 U.S. 558, 580, 123 S.Ct. 2472, 2485 (U.S. 2003).)

A In Conflict with *Cleburne*, the Michigan Supreme Court Did Not Find the Plaintiff Similarly Situated to Rainbow Rascals.

In *Cleburne*, this United States Supreme Court looked beyond the written classification of the local zoning ordinances and found homes for the mentally retarded factually similar to a hospital or fraternity house. When the local government tried to justify the differences, all of the argued differences were denied. This same analysis must be done in this case or Equal Protection is lost in favor of the lines drawn by local governments in their zoning ordinances.

Here, the Record before the Michigan Supreme Court was clear that the use proposed by the Plaintiff is indeed similar, if not exactly the same with less children, to the secular use allowed by Rainbow Rascals. As shown in *Cleburne*, the lack of differences often amplifies the similarities.

Here, the Plaintiff's sought to use the Property to continue and extend the existing Catholic Montessori religious (faith based) education for 25 young children. Rainbow Rascals previously used the same Property as a child development center for 100 young children. The Record before the Michigan Supreme Court confirms that Rainbow Rascals provides children with **education** in reading, mathematics, science, social studies, computer and even a foreign language. (App. R , 211a-215a)[1]

> "**Rainbow Child Development will introduce your child** to the wonders of learning. We will help him or her explore the world of social and **intellectual development**,

---

[1] The United States Court of Appeals for the Sixth Circuit has ruled that, when determining whether entities are similarly situated, the reviewing court should **not** demand **exact correlation,** but should instead seek only **relevant similarity**.

> "In addition, this Court has asserted that in applying the standard **courts should not demand exact correlation, but should instead seek relevant similarity**. *See Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir.1998). Here, all hearing officers were supervised by the same officials, subject to the same standards, and charged with the same duties. They were indeed similarly situated." (*Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir. 2000).)

> enabling them to gain self-esteem and confidence, while respecting each child as an important and unique person. **Children have the opportunity to read, experience a foreign language, learn about mathematics, science, social studies, health, computers, and other developmental areas.**" (Rainbow Rascals' Web Site) (Emphasis Added) (App. R at 212a-213a)

The Plaintiff's operation, like Rainbow Rascals, involves young children and a system of learning. The Plaintiff's operation, like Rainbow Rascals, involves supervision of these young children by a group of adults. The Plaintiff's operation, like Rainbow Rascals, involves educating young children through mental and visual stimuli. The Plaintiff's operation sought to use the exact same Property that Rainbow Rascals had used. The uses are similar, if not identical.

This United States Supreme Court's ruling in *Cleburne* found that a home for the mentally retarded was sufficiently similarly situated to fraternity houses and hospitals to trigger the Equal Protection Clause. This factual finding in *Cleburne* was undertaken despite the language distinguishing the uses in the underlying zoning ordinance. In *Cleburne*, this United States Supreme Court focused on the fact that the defendants zoning allowed for boarding houses and hospitals but did not allow for homes for the mentally retarded. This United States Supreme Court found that this was sufficient to trigger Equal Protection analysis and demanded that a rational basis be

demonstrated for this distinction.[2] Just as the *Cleburne* plaintiff's proposed use was similar to hospitals and fraternity houses, here, the Plaintiff is similarly situated to Rainbow Rascals and the Plaintiff was treated 100% differently.[3] The Plaintiff has met the threshold inquiry under Equal Protection and demonstrated that it was treated differently from a similarly situated entity. The Michigan Supreme Court rejected *Cleburne* in ruling otherwise.

This United States Supreme Court has ruled that, if it appears that an individual is being singled out, the specter of arbitrary classification is raised and the Equal Protection Clause requires a rational basis for the difference in treatment. This applies here.

> "When those who appear **similarly situated** are nevertheless treated differently, the **Equal Protection Clause** requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being "treated alike, under like circumstances and conditions." **Thus, when it appears that an individual is being singled**

---

[2] This United States Supreme Court did not rule that the *Cleburne* plaintiff had to demonstrate that another home for the mentally retarded had to have applied for a special use permit and be denied in order to trigger the threshold equal protection inquiry.

[3] Given the *Cleburne* facts, the Michigan Supreme Court would have ruled that the Cleburne facility was not similar to a hospital, boarding house or fraternity house because it was not a hospital, boarding house or fraternity house. As a result, the Michigan Supreme Court would have found no Equal Protection violation.

> **out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a "rational basis for the difference in treatment**." *Olech,* 528 U.S. at 564, 120 S.Ct. 1073." (*Engquist v. Oregon Dep't of Agr.*, 128 S.Ct. 2146, 2153 (2008).)

This United States Supreme Court ruled in *F.S. Royster Guano Co. v. Commonwealth of Virginia,* 253 U.S. 412, 415, 40 S.Ct. 560, 561 - 562 (U.S.1920), that the Equal Protection Clause does not forbid all classifications, but the **classification** must be reasonable and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. This certainly applies here. As it stands, the Defendants have been allowed to argue and win a distinction in use where none exists. This is fundamentally wrong.

> "**It is unnecessary to say that the 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the states from resorting to classification for the purposes of legislation**. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. **But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the **562 legislation, so that all persons similarly circumstanced shall be treated alike**." (*F.S. Royster Guano Co. v. Commonwealth of Virginia,* 253 U.S. 412, 415,

40 S.Ct. 560, 561 - 562 (U.S.1920).) (Emphasis Added)

In the case at hand, there is no "ground of difference" between the Plaintiff and Rainbow Rascals to justify treating them differently. The specter of arbitrary classification hangs heavy in this case.

B **In Conflict With *Cleburne*, There Was No Rational Reason For The Plaintiff To Be Treated Differently From Rainbow Rascals.**

This United States Supreme Court has ruled that, when those who appear similarly situated are treated differently, the Equal Protection Clause requires a rational reason for the difference.

> "When those who appear **similarly situated** are nevertheless treated differently, the **Equal Protection Clause** requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being "treated alike, under like circumstances and conditions." (*Engquist v. Oregon Dep't of Agr.*, 128 S.Ct. 2146, 2153 (2008).)

In *Cleburne*, this United States Supreme Court rejected each of the alleged rational reasons/concerns proffered for requiring a permit for the proposed facility for the mentally retarded. Specifically, this United States Supreme Court rejected concerns related to negative attitudes, location of the facility, flood plain concerns, size of the home and attendance.

"Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case." (*City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 105 S.Ct. 3249, 3258 (U.S. Tex. 1985).)

Here, the Record before the Michigan Supreme Court demonstrated that the Plaintiff's proposed use of the Property for the (faith based) education of 25 young children would not create any different traffic concerns because the existing parking is sufficient.

"11. Please admit that the Defendants made no finding on the record at the "**variance hearing**" indicating any traffic concerns related to the "**variance request**."

ANSWER: . . .Defendants admit that there was no discussion at the hearing on plaintiff's variance request regarding *excessive motor vehicle traffic or like problems*." (Defendants Response to Request to Admit dated May 17, 2005) (Emphasis Added) (App. U at 232a-233a)

"8. Please admit that the Defendants made no finding on the record at the "**variance hearing**" indicating any parking concern related to the "**variance request**."

ANSWER: . . . Defendants admit that the issue of motor vehicle *parking* was not

> **discussed during the hearing on plaintiff's variance application." (Defendants Response to Request to Admit dated May 17, 2005)** *(*App. U at 232a*)*

Here, the Record before the Michigan Supreme Court was clear that the Plaintiff's proposed use has no demonstrated health, safety or sanitation concerns different from the prior use of Rainbow Rascals.

> 12. Please admit that the Defendants made no finding on the record at the "**variance hearing**" indicating any ***sewage*** concern related to the "**variance request**."
>
> **ANSWER: Defendants admit that there was no discussion of *sewage* at the hearing on plaintiff's variance request.**
>
> 13. Please admit that the Defendants made no finding on the record at the "**variance hearing**" indicating any ***fire*** concern related to the "**variance request**."
>
> **ANSWER: Defendants admit that there was no discussion of any *fire* concern at the hearing on plaintiff's variance request." (Defendants Response to Request to Admit dated May 17, 2005) (Emphasis Added)** *(*App. U at 233a)

Nowhere in the Record before the Michigan Supreme Court was there one scintilla of evidence indicating that the use desired by the Plaintiff posed any public health or safety concern different from the prior use by Rainbow Rascals.

"10. Please admit that the Defendants made no finding on the record at the "**variance hearing**" indicating any ***public health concern*** related to the "**variance request**."

ANSWER: Defendants admit that there was no discussion of *public health concerns* at the hearing on plaintiff's variance." (Defendants Response to Request to Admit dated May 17, 2005) (Emphasis Added) (App. U at 232a)

The Record before the Michigan Supreme Court provided no indication of any articulated concern or reason for denying the Plaintiff's proposed Property use. The Record before the Michigan Supreme Court is clear that the Property use requested by the Plaintiff had no alleged or demonstrated detrimental impact on the land, environment, water, sanitation, traffic or any other aesthetic concern. (App. U, 228a-244a) In *Cleburne*, their were at least some reasons articulated by the *Cleburne* defendant for denying the use. Here, in the face of obviously similar uses, the Defendants put forth no evidence at all as to why the Plaintiff's proposed use of the Property for 25 children should be denied.

This United States Supreme Court ruled in *Cleburne* that the Equal Protection Clause of the Fourteenth Amendment is a direction that all persons similarly situated should be treated alike.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is

> essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982)." (*City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254 (U.S. Tex. 1985).)

This United States Supreme Court has ruled that the purpose of the Equal Protection Clause is to secure every person against intentional and arbitrary discrimination either by the express terms of a statute or its improper execution.

> "Our cases have recognized successful equal protection claims brought by a "class of one," **where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment**. See *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989). In so doing, we have explained that "'**[t]he purpose******1075 of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.**'" *Sioux City Bridge Co., supra*, at 445, 43 S.Ct. 190 (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352, 38 S.Ct. 495, 62 L.Ed. 1154

(1918))." (*Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 1074 - 1075 (U.S. 2000).)

There is no dispute here that the Plaintiff and Rainbow Rascals were similarly situated in all relevant respects. There is even less dispute that the governmental decision makers treated the Plaintiff and Rainbow Rascals entirely differently. The difference in treatment cannot be more drastic. The Plaintiff was absolutely prohibited from using the Property for 25 children and Rainbow Rascals was absolutely allowed to use the exact same Property for 100 children. Just as in *Cleburne*, the Record is clear that there is no rational reason for treating the Plaintiff's proposed use differently. In conflict with *Cleburne*, the Michigan Supreme Court ruled that the Plaintiff was not treated differently from a similarly situated entity despite the fact that the Record did not reveal that the Plaintiff's proposed use threatened any legitimate interest of the Defendants in a way that Rainbow Rascals previously permitted use would not. The Michigan Supreme Court has rejected *Cleburne*.

This United States Supreme Court has ruled that the rational relationship standard is not met when the classification relied upon is so attenuated as to render the distinction arbitrary or irrational.

> "*The rational relationship standard is not met when the classification relied upon by the legislative authority is "so attenuated as to render the distinction arbitrary or irrational."* (*City of Cleburne*, 473 U.S. at 446, 105 S.Ct. at 3258)

The distinction between the Plaintiff and Rainbow Rascals is arbitrary and irrational. The Michigan Supreme Court's ruling directly conflicts with *Cleburne* and blesses local governments with impunity to make any arbitrary classification they choose. Local governments are free to make any classification they choose without any fear of violating Equal Protection. This is not what the framers of the 14th Amendment intended.

II. The Question Presented Is Important.

The Michigan Supreme Court's **published** Opinion now allows the State of Michigan and its agencies to tread fully and cavalierly on the rights of its citizens by ignoring the Equal Protection Clause and treating similarly situated entities differently just because a preconceived zoning ordinance listed the uses in a different category. The Michigan Supreme Court's ruling directly conflicts with this United States Supreme Court's rulings including *Cleburne*.

III. The Decision Of The Michigan Supreme Court Is Erroneous.

The Michigan Supreme Court's **published** Opinion affects every citizen in the State of Michigan. The Michigan Supreme Court's Opinion allows the State, local governments and related State agencies to treat similarly situated entities differently based solely on the lines drawn in local zoning ordinances which often are riddled with biases, prejudices and the unsupported wishes of local officials. The Michigan Supreme Court has rejected *Cleburne*. The impact of the Michigan Supreme Court's ruling is that the State of Michigan, local governments and related State

agencies are now the sole arbiters of Equal Protection claims in Michigan. Local governmental agencies, such as municipalities and townships, are now free to preordain through local zoning ordinances who will be treated as similarly situated. Thus, the concept of Equal Protection in Michigan is now abandoned in favor of zoning ordinances.

Certiorari jurisdiction is warranted to correct this error and clarify the law at issue.

CONCLUSION

For the reasons stated above, the Petitioner respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

ROBERT L. BUNTING
Counsel of Record for Petitioner
Shepherd Montessori Center, Milan
P.O. Box 7
Oxford, MI 48371
Telephone (248) 628-5150
lciseadog@yahoo.com

Robert Charles Davis
Co-Counsel for Petitioner
Shepherd Montessori Center Milan
10 S. Main St., Suite 401
Mt. Clemens, MI 48043
Telephone (586) 469-4300
Facsimile (586) 469-4303
rdavis@davislistman.com

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A:	Opinion, Michigan Supreme Court (June 18, 2010)	1a
Appendix B:	Order, Michigan Supreme Court (July 9, 2009)	22a
Appendix C:	Opinion on remand, State of Michigan Court of Appeals (August 26, 2008)	24a
Appendix D:	Order, Michigan Supreme Court (March 28, 2008)	32a
Appendix E:	Order, State of Michigan Court of Appeals (August 21, 2007)	35a
Appendix F:	Order denying rehearing, State of Michigan Court of Appeals (July 13, 2007)	37a
Appendix G:	Opinion, State of Michigan Court of Appeals (May 22, 2007)	39a

Appendix H: Opinion and Order granting defendants' motion for summary disposition and denying plaintiff's motion for summary disposition, State of Michigan In the Circuit Court for the County of Washtenaw (July 26, 2006) 59a

Appendix I: Order, Michigan Supreme Court (September 16, 2004) 89a

Appendix J: Opinion, State of Michigan Court of Appeals (November 6, 2003) 91a

Appendix K: Unpublished Opinion, Michigan Circuit Court (March 13, 2001) 125a

Appendix L: Order denying rehearing, Michigan Supreme Court (August 2, 2010) 165a

Appendix M: U.S. Constitution, Amendment XIV (July 16, 1868) 167a

Appendix N: Letter, from Paul Roney, Domino's Farms President to Ann Arbor Township Zoning Board of Appeals Officials (includes fold-out exhibit) (June 2, 2000) 169a

Appendix O: Zoning Variance Application (May 30, 2000) 171a

Appendix P: Zoning Ordinances 184a

Appendix Q: Minutes, Ann Arbor Township Zoning Board of Appeals (December 3, 1991) 209a

Appendix R: Website, Rainbow Rascals ... 211a

Appendix S: Letter, from Gary Dresselhouse, Ann Arbor Township Zoning Official, to Van Belanger, Domino's Farms (May 1, 2000) 216a

Appendix T: Minutes, Ann Arbor Township Zoning Board of Appeals (June 28, 2000) 218a

Appendix U: Defendant's response to Plaintiff's first request for admissions, State of Michigan In the Circuit Court for the County of Washtenaw (May 17, 2005) 228a

APPENDIX A

Michigan Supreme Court
Lansing, Michigan

Opinion	Chief Justice: Marilyn Kelly	Justices: Michael F. Cavanagh Elizabeth A. Weaver Maura D. Corrigan Robert P. Young, Jr. Stephen J. Markman Diane M. Hathaway

FILED JUNE 18, 2010

STATE OF MICHIGAN
SUPREME COURT

No. 137443

SHEPHERD MONTESSORI CENTER MILAN, a Michigan not for profit corporation,

Plaintiff-Appellee,

v

ANN ARBOR CHARTER TOWNSHIP, ANN ARBOR CHARTER TOWNSHIP ZONING OFFICIAL, and ANN ARBOR CHARTER TOWNSHIP ZONING BOARD

OF APPEALS,)
)
Defendants-Appellants.)
)

BEFORE THE ENTIRE BENCH

HATHAWAY, J.

At issue is whether defendants violated plaintiff's right to equal protection by denying a request for a zoning variance. We hold that defendants' denial of plaintiff's variance request does not violate equal protection principles because plaintiff has not met the threshold burden of proof for its equal protection challenge by showing disparate treatment of similarly situated entities based on religion. Accordingly, we reverse the Court of Appeals judgment and reinstate the trial court's order granting defendants' motion for summary disposition.

I. FACTS AND PROCEEDINGS

This case originates from a zoning dispute in Ann Arbor Township. The property at issue is zoned as an office park (OP) district pursuant to the township zoning ordinance, and is located within Domino's Farms office complex. Among the uses permitted in the township's OP zoning district are daycare facilities for use by children of office park employees. Rainbow Rascals, a former tenant of Domino's Farms, had operated a 100-child-capacity secular preschool daycare facility in the office park limited to children of office park employees. In 1991, Domino's Farms, on behalf of Rainbow Rascals, applied to Ann Arbor Township for a variance to allow children whose

parents did not work at the Domino's Farms office complex to attend the Rainbow Rascals daycare. The township's Zoning Board of Appeals (ZBA) granted the requested variance.

In 1998, plaintiff Shepherd Montessori opened a Catholic preschool daycare facility in this same office park complex. The facility was originally limited to children of office park employees. Thereafter, Domino's Farms applied to Ann Arbor Township for a variance to allow children whose parents did not work at the office park to attend Shepherd Montessori's facility, a variance virtually identical to the one granted to Rainbow Rascals. The ZBA again granted the requested variance.

In 2000, Rainbow Rascals moved out of the office park, and Shepherd Montessori proposed to move into the vacated space and operate a K-3 primary school program. Shepherd Montessori sent a letter to the township's zoning administrator describing the proposal. The zoning administrator denied plaintiff's proposed use of the property, explaining that the operation of a primary school is not a permitted use within an OP district as designated in the township's zoning ordinance. Plaintiff filed a petition with the ZBA seeking in the alternative either (1) reversal of the zoning administrator's decision, (2) a use variance, or (3) a determination that plaintiff's proposed use of the property can be considered a "substituted use" of the prior "nonconforming" Rainbow Rascals daycare program.

The ZBA held a hearing on plaintiff's petition. During the hearing, plaintiff's attorney asserted that plaintiff should receive special consideration because

its primary school would have a religious component that would be a use favored by the Constitution. One ZBA member questioned plaintiff's attorney regarding this assertion and inquired whether counsel believed that plaintiff "has some additional right to relief that she [sic] would not have as a nonsectarian private school without a religious affiliation based on the Constitution." Plaintiff's attorney responded that he believed plaintiff is afforded additional rights under the Constitution, which favors education and religion.

At the conclusion of the hearing, the ZBA indicated that it agreed with the zoning administrator's decision and denied plaintiff's request because a primary school is not a permitted use within an OP district as designated in the township's ordinance. The ZBA also ruled that plaintiff's proposed nonconforming primary school use could not be substituted for Rainbow Rascals' use of the property because the daycare was a permitted use whereas a school is not. Finally, the ZBA voted to deny plaintiff's request for a use variance to operate a primary school in the OP district because plaintiff did not prove that without the variance, there could be no other viable economic use of the property. The vote on all three issues was unanimous.

Plaintiff sued the township, alleging, among other things, that its equal protection rights were violated by defendants' denial of the variance request.[1] The matter

---

[1] This matter has been pending in the courts since 2000. The procedural history is complex. Plaintiff initially filed a lawsuit alleging violations of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 USC 2000cc *et seq.*, substantive due process, procedural due process, and equal protection. The parties filed cross-motions for summary disposition.

The trial court ruled that plaintiff had no claim under RLUIPA and also dismissed plaintiff's constitutional claims. Plaintiff appealed in the Court of Appeals, and the Court of Appeals reversed the trial court's grant of summary disposition on plaintiff's RLUIPA and equal protection claims and remanded to the trial court for further proceedings. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp (Shepherd I)*, 259 Mich App 315; 675 NW2d 271 (2003). The township filed an interlocutory application for leave to appeal to this Court, which was denied. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 471 Mich 877 (2004).

In 2006, on remand the parties again filed cross-motions for summary disposition on the RLUIPA and equal protection claims. The trial court granted defendants' motion and denied plaintiff's. Plaintiff once again appealed the decision in the Court of Appeals, which reversed the trial court's opinion and order granting defendants' motion for summary disposition and remanded for entry of judgment in favor of plaintiff and for reversal of the ZBA's denial of plaintiff's variance request. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp (Shepherd II)*, 275 Mich App 597; 739 NW2d 664 (2007). The Court of Appeals concluded that plaintiffs had established a substantial burden on religious exercise to support the RLUIPA claim and also held in favor of plaintiff's equal protection claim. Defendants filed a motion for reconsideration in the Court of Appeals, which the Court denied. Plaintiff filed a motion for sanctions against defendant, arguing that defendant's motion for reconsideration was vexatious under MCR 7.216(C). The Court of Appeals agreed, awarding plaintiff costs and attorney fees in an amount to be determined by the trial court.

Defendants filed applications for leave to appeal in this Court, challenging *Shepherd I* and *Shepherd II* and the Court of Appeals order imposing sanctions against defendants. On March 28, 2008, this Court vacated the judgment of the Court of Appeals in *Shepherd II*, reversed the order awarding plaintiff sanctions for a vexatious motion for reconsideration, and remanded the case to the Court of Appeals for reconsideration in light of *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich 373; 733

currently before us addresses plaintiff's equal protection challenge. On the most recent remand from this Court, the Court of Appeals affirmed its prior decision that the defendants' application of the zoning ordinance violated the Equal Protection Clause. Applying the strict scrutiny standard of review, the panel held that defendant "treated a secular entity more favorably than plaintiff, a religious entity," and that defendant offered no evidence to show that the denial of plaintiff's variance was "precisely tailored to achieve a compelling governmental interest." The Court of Appeals remanded the case to the trial court for entry of a judgment in favor of plaintiff.[2] Defendants filed an application for leave in appeal to this Court, and we granted defendants' application limited to consideration of "(1) whether the Court of Appeals applied the correct standard of review in determining that the defendants violated the plaintiff's right to equal protection; and (2) whether the defendants violated the plaintiff's right to equal

---

NW2d 734 (2008). *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 480 Mich 1143 (2008).

On remand, the Court of Appeals applied this Court's decision in *Greater Bible Way* and held that the trial court had correctly granted summary disposition in favor of defendants on the RLUIPA claim. However, the Court of Appeals also held that the remand order did not alter its prior ruling that defendants' application of the zoning ordinance violated the Equal Protection Clause, and the Court remanded the case to the trial court for entry of a judgment in favor of plaintiff. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp (On Remand) (Shepherd III)*, 280 Mich App 449; 761 NW2d 230 (2008).

[2] *Shepherd III*, 280 Mich App 449.

protection in denying the plaintiff's request for a variance."[3]

II. STANDARD OF REVIEW

A trial court's ruling on a motion for summary disposition is a question of law, which this Court reviews de novo.[4] Underlying constitutional issues are also reviewed de novo by this Court.[5]

III. ANALYSIS

At issue in this case is whether defendants' denial of plaintiff's zoning variance request was constitutionally permissible. In order to resolve this issue, we apply the following principles of equal protection law.

The equal protection clauses of the Michigan and United States constitutions provide that no person shall be denied the equal protection of the law.[6] This Court has held that Michigan's equal protection provision is coextensive with the Equal Protection Clause of the United States Constitution.[7] The Equal

---

[3] *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 483 Mich 1131 (2009).

[4] *Haynes v Neshewat*, 477 Mich 29, 34; 729 NW2d 488 (2007).

[5] *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508; 751 NW2d 453 (2008).

[6] Const 1963, art 1, § 2; US Const, Am XIV.

[7] *Harvey v State of Mich*, 469 Mich 1, 6; 664 NW2d 767 (2003). The Court explained:

> By this, we do not mean that we are bound in our

Protection Clause requires that all persons similarly situated be treated alike under the law.[8] When reviewing the validity of state legislation or other official action that is challenged as denying equal protection, the threshold inquiry is whether plaintiff was treated differently from a similarly situated entity.[9] The general rule is that legislation that treats similarly situated groups disparately is presumed valid and will be sustained if it passes the rational basis standard of review: that is, the classification drawn by the legislation is rationally related to a legitimate state interest.[10] Under this deferential standard, "the burden of showing a statute to be

---

understanding of the Michigan Constitution by any particular interpretation of the United States Constitution. We mean only that we have been persuaded in the past that interpretations of the Equal Protection Clause of the Fourteenth Amendment have accurately conveyed the meaning of Const 1963, art 1, § 2 as well. [Id. at 6 n 3.]

[8] *City of Cleburne v Cleburne Living Ctr, Inc*, 473 US 432, 439, 105 S Ct 3249, 87 L Ed 2d 313 (1985).

[9] *Watson v Williams*, 329 Fed Appx 193, 196 (CA 10, 2009) (citing *City of Cleburne*, 473 US at 439, for the proposition that an equal protection claim "requires a threshold allegation that the plaintiff was treated differently from similarly situated individuals."); *Gilmore v Douglas Co*, 406 F3d 935, 937 (CA 8, 2005) ("As a threshold matter, to establish the particular equal protection claim alleged by [the plaintiff], she must establish that some government action caused her to be treated differently from others similarly situated.").

[10] *City of Cleburne*, 473 US at 440.

unconstitutional is on the challenging party, not on the party defending the statute[.]"[11]

However, when legislation treats similarly situated groups disparately on the basis of a suspect classification, such as race, alienage, or national origin, or infringes on a fundamental right protected by the Constitution, such as the free exercise of religion, the legislation will only be sustained if it passes the rigorous strict scrutiny standard of review: that is, the government bears the burden of establishing that the classification drawn is narrowly tailored to serve a compelling governmental interest.[12]

If entities are treated differently on the basis of the quasi-suspect classes of gender and illegitimacy, intermediate scrutiny applies, and the burden is on the government to show that the classification serves important governmental objectives and that the means employed are substantially related to the achievement of those objectives.[13]

The ordinance in question is indisputably facially neutral in that it does not, on its face, treat religious and secular entities differently. Here, plaintiff complains that, in applying the ordinance, the township treated it differently from one other entity: Rainbow Rascals. The United States Supreme Court

---

[11] *New York State Club Ass'n, Inc v City of New York*, 487 US 1, 17; 108 S Ct 2225; 101 L Ed 2d 1 (1988).

[12] *City of Cleburne*, 473 US at 440.

[13] *Craig v Boren*, 429 US 190, 197; 97 S Ct 451; 50 L Ed 2d 397 (1976).

allows such "class of one" claims to be brought, but requires a plaintiff to show that it was actually treated differently from others similarly situated and that no rational basis exists for the dissimilar treatment.[14] The Court of Appeals erred in concluding that strict scrutiny applied to plaintiff's equal protection claim because, as discussed below, defendants' actions did not substantially burden plaintiff's free exercise of religion.[15]

In order to determine whether plaintiff's equal protection rights were violated, we begin by analyzing the threshold inquiry for an equal protection challenge, that being whether plaintiff was treated differently from a similarly situated entity. Plaintiff asserts that Rainbow Rascals and plaintiff are similarly situated and that defendants treated them differently. Plaintiff argued that defendants conceded

---

[14] *Village of Willowbrook v Olech*, 528 US 562, 564; 120 S Ct 1073; 145 L Ed 2d 1060 (2000) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."); *Congregation Kol Ami v Abington Twp*, 309 F3d 120, 133 (CA 3, 2002) ("[L]and use ordinances that do not classify by race, alienage, or national origin, will survive an attack based on the Equal Protection Clause if the law is 'reasonable, not arbitrary' and bears 'a rational relationship to a (permissible) state objective.'"), quoting *Village of Belle Terre v Boraas*, 416 US 1, 8; 94 S Ct 1536; 39 L Ed 2d 797 (1974) (quotation marks omitted).

[15] The Court of Appeals also held that defendants' denial of plaintiff's variance request does not substantially burden plaintiff's religious exercise, and plaintiff has not appealed that decision.

Rainbow Rascals and plaintiff were similarly situated by stating in their brief that "[t]he similarity of the two entities is not in dispute." The Court of Appeals agreed and used this statement as the basis for holding that Rainbow Rascals and plaintiff were similarly situated. In reaching its conclusion, the Court stated:

> *Defendants conceded that plaintiff and Rainbow Rascals were similarly situated*, and defendants failed to offer a reason for refusing to permit plaintiff to operate its school in the same space that Rainbow Rascals had operated its day care program.
>
> * * *
>
> Thus, we hold that defendants have treated a secular entity more favorably than plaintiff, a religious entity. . . . Accordingly, the trial court erred when it failed to grant summary disposition to plaintiff. [*Shepherd III*, 280 Mich App at 455-456 (citation and quotation marks omitted; emphasis added).]

A review of the relevant document demonstrates that defendants' statement has been taken out of context. More importantly, this argument focuses the inquiry on an irrelevant factor. Defendants' brief states:

> The similarity of the two entities is not in dispute. Defendants' treatment of these entities is the real issue, and in truly comparable situations defendants did not treat plaintiff differently.

While plaintiff argues that this is a concession that the entities are similarly situated, defendants' statement only sets forth that the entities are similar to the degree that they both operate daycare facilities. However, the relevant inquiry in this instance focuses on Shepherd Montessori's current variance request as compared to Rainbow Rascals's previously granted requests.

In determining whether plaintiff and Rainbow Rascals are similarly situated entities that were treated differently, we must examine their respective variance requests. Plaintiff's current request is for a variance to operate a K-3 primary school. Under the OP district rules, primary school education is not a permitted use. Historically, both Rainbow Rascals and plaintiff have operated daycare facilities, not primary schools. Rainbow Rascals originally operated its daycare facility for children of office park employees only. It requested a variance to expand the daycare operation to include children whose parents did not work in the office park. The township granted that variance. When Shepherd Montessori initially commenced its daycare operation, it was similarly limited to children of office park employees. Eventually, Shepherd Montessori made the same request as Rainbow Rascals: to expand operations to permit children whose parents were not office park employees to use the facility. The township granted this request, just as it had for Rainbow Rascals. Thus, when Rainbow Rascals and plaintiff made the same request, defendants treated the two entities the same and granted both requests.

In contrast, plaintiff's current request is to operate a primary school. There is no question that a primary

school is *not* a permitted use in an OP district. Rainbow Rascals has never made a request for a variance to operate a primary school. Plaintiff does not allege that any other entity has ever made a request to operate a primary school in an OP district, or that any request to operate a primary school in an OP district has ever been granted. Thus, the record indicates that plaintiff is making a request that no entity has made before. Operating a daycare facility is not the same as operating a primary school. This OP district is simply not zoned for primary education. Thus, the township's consideration of plaintiff's variance request cannot be compared to any other variance request because plaintiff has provided no evidence that anyone has ever made a similar request of the township. There simply is no other entity to compare it to. Given this fact, we cannot compare defendants' denial of plaintiff's variance request to operate a primary school to Rainbow Rascals's request, because they are not the same request. The township's consideration of different requests does not constitute different treatment of similarly situated entities.

Indeed, plaintiff is not seeking similar treatment; rather, plaintiff is asserting religion in an effort to obtain preferential treatment. However, the Equal Protection Clause does not require that plaintiff get better treatment than a secular entity. It only requires "equal" treatment, and that is exactly what plaintiff has received, because nobody within the township has been allowed to operate a school in an OP district. The township is not forbidding plaintiff from operating a primary school; it is simply regulating where that school can be operated. If plaintiff wants to operate a school, it can do so; it just has to operate it on property that is zoned for schools. If plaintiff wants to use the

property for child care, then it can operate a daycare center on the property. In other words, in the realm of the operation of primary schools and daycare centers, plaintiff has to follow the law like everyone else. This does not amount to differential treatment of similarly situated entities. Thus, because plaintiff has failed to demonstrate that it was treated differently from similarly situated entities, we need not apply the rational basis test to determine whether the zoning ordinance is rationally related to a legitimate state interest.[16]

Lastly, we address plaintiff's assertion that defendants discriminatorily applied the facially neutral zoning ordinance against it because of its religious affiliation, thereby treating it, a religious entity, differently from everyone else. As noted previously, it is not disputed that the zoning ordinance at issue in this case is facially neutral. "A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate" on the basis of a suspect classification such as religion.[17] A facially neutral law that only incidentally burdens a particular religious

---

[16] *Silver v Franklin Twp Bd of Zoning Appeals*, 966 F2d 1031, 1036-1037 (CA 6, 1992) ("The basis of any equal protection claim is that the state has treated similarly-situated individuals differently. Because [the plaintiff] does not claim an infringement of a fundamental right or discrimination against a suspect class, we would review the Board's actions using a rational basis test. . . . In this case, however, we need not even go so far as to apply the rational basis test because [the plaintiff] has failed to demonstrate that the Board treated him differently from similarly-situated individuals.").

[17] *Washington v Davis*, 426 US 229, 241; 96 S Ct 2040; 48 L Ed 2d 597 (1976).

practice will not be held to discriminate on the basis of religion.[18] A facially neutral law will not be held unconstitutional solely because it results in disproportionate impact; proof of discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.[19] Discriminatory intent or purpose can be inferred from the totality of relevant facts.[20]

Plaintiff argues that the reason defendants denied plaintiff a variance to operate a Catholic school is because of religious animus, and that this denial infringed on plaintiff's free exercise of religion. In support of this argument, plaintiff asserts that the line of questioning regarding religion and preferential treatment by one of the ZBA members at the hearing shows that the ZBA members were biased against plaintiff's religion and that the variance was denied because of that bias. The record, however, does not support this conclusion. Plaintiff's attorney initially introduced the subject of plaintiff's religious affiliation

---

[18] See *Church of Lukumi Babalu Aye v City of Hialeah*, 508 US 520, 531; 113 S Ct 2217; 124 L Ed 2d 472 (1993). See also *Employment Div v Smith*, 494 US 872, 878-879; 110 S Ct 1595; 108 L Ed 2d 876 (1990) (stating that an individual's religious beliefs do not excuse that person "from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate" and that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that the religion prescribes (or proscribes))." (Citation and quotation marks omitted.)

[19] *Arlington Hts v Metro Housing Dev Corp*, 429 US 252; 264-265; 97 S Ct 555; 50 L Ed 2d 450 (1977).

[20] *Washington*, 426 US at 242.

during the ZBA hearing by intimating that plaintiff should receive "special consideration" because of its religious purpose. The minutes from the hearing describe the exchange as follows:

> [ZBA member] Laporte asked Attorney Davis about his initial presentation when he spoke about the Constitution and religious freedom. Laporte asked if the petitioner believed that she has some additional rights to the relief that she would not have as a non-sectarian private school without a religious affiliation based on the Constitution.
>
> Davis responded that he believes that the petitioner has rights afforded under the Constitution which do favor as a use education and religion. However, the petitioner is proceeding under Sec. 23.08,C of the Ordinance which allows for a substitution of use.
>
> On further questioning from Laporte, Davis stated that the petitioner believes she has the rights afforded to her that start with the US Constitution and the Michigan Constitution and as a property-owner tenant under the Township's zoning scheme. Davis stated that the Constitution has provisions that favor uses that promote education and religion.

ZBA member Laporte validly questioned plaintiff's attorney about the basis for the assertion that religious use should be favored over secular uses. Nothing in the exchange demonstrates bias against Catholics or Catholic primary education. The questions were asked to clarify plaintiff's attorney's own

statements. Nothing in the minutes of the ZBA hearing supports the conclusion that the ZBA denied plaintiff the variance because of a bias against plaintiff's religious affiliation.

Furthermore, plaintiff's director, Naomi Corera, admitted that she could not cite any proof that religious bias existed:

> *Q.* And was there something said at that hearing that said, we are doing this because of your religious exercise or the religious component of your program?
>
> *A.* No.
>
> *Q.* Did you ever hear of any such evidence or statements after the meeting for the application?
>
> *A.* No.
>
> *Q.* Where did you pick up that understanding [of anti-Catholic bias] if you didn't experience it there at that meeting?
>
> *A. Here, there, just different places.*
>
> *Q.* Is there any way that you can specify that? Did you have a conversation with any particular person about some sort of bias on the part of the township?
>
> *Mr. Davis*: I think the witness is entitled to have her own belief without having reasons for it.

* * *

Q. Okay. So you can't point to any specific statements or any specific conversations?

A. I can't, no. I cannot point a finger at one person, no.

[Emphasis added.]

Thus, this testimony clearly illustrates that there is no evidence to support plaintiff's claim of religious bias or animus. The burden of proof to demonstrate that religious bias or animus exists cannot be sustained by an assertion that a person's understanding comes from "[h]ere, there, just different places." As plaintiff has presented no evidence to support its claim, we cannot conclude that the ZBA's decision to deny its variance request was based on religious animus. Defendants did not discriminatorily apply the ordinance against plaintiff on the basis of religion.[21]

---

[21] Although we find no scintilla of evidence that defendants discriminatorily applied the ordinance against plaintiff on the basis of religion, we note that only one member of the ZBA questioned plaintiff regarding its request for preferential treatment based on religious affiliation. Notably, the ZBA's decision to deny plaintiff's variance was a unanimous vote. Compare this case to *Mt Elliott Cemetery Ass'n v City of Troy*, 171 F3d 398 (CA 6, 1999), which held that a comment by the mayor of Troy that she would approve a new Catholic cemetery "over [her] dead body" did not demonstrate prejudice against Catholics and, since the mayor only represented one of the six votes against the rezoning request, the mayor's statement could not show that the city council's denial of the request was motivated by religious discrimination. *Id.* at 406. Given the Sixth Circuit's ruling in *Mt*

The ordinance here is generally applicable and prohibits *all* schools in the OP zoning district. Plaintiff has presented no evidence that defendants have not uniformly applied the ordinance. The ordinance deals with zoning regulation, which this Court has long recognized as a reasonable exercise of the state's police power to regulate for the public health, safety, and welfare.[22] While the ordinance in this case does affect plaintiff's religious exercise by prohibiting the opening of a Catholic school, the effect is only incidental. The ordinance at issue prohibits schools in an area that is zoned as an office park, which is a valid exercise of defendants' police power. Thus, although plaintiff's religious exercise is restricted because it is not being allowed to open a Catholic school, the restriction only incidentally burdens religious exercise because the ordinance contemplates that all schools should be disallowed in the OP district, not just religious ones.[23]

Elliott, the ZBA members comments could not have been a basis to prove that there was a discriminatory intent behind defendants' decision to deny plaintiff's variance request.

[22] See *Austin v Older*, 283 Mich 667, 674-675; 278 NW 727 (1938).

[23] Plaintiff additionally cites *Vineyard Christian Fellowship of Evanston, Inc* v City of Evanston, 250 F Supp 2d 961 (ND Ill, 2003), to support its argument that defendants in this case treated religious entities differently than secular counterparts. We find *Vineyard* unpersuasive and distinguishable. In *Vineyard*, the plaintiff, a religious institution, owned property within the defendant's city limits. The city zoning ordinance prohibited the plaintiff from using the property for religious worship, but allowed other cultural uses. *Vineyard* held that, although the ordinance did not single out a particular religious group, it nevertheless classified on the basis of religion because of its wholesale bar against religious worship. The court held that the church's equal protection rights were violated. Conversely, in the case before us,

Plaintiff is free to operate a Catholic school, but it must do so on property that is zoned for schools. There is no evidence supporting the claim that defendants denied plaintiff's variance request because of religious animus, and the variance denial does not substantially burden plaintiff's religious exercise.

For these reasons, we conclude that plaintiff was not treated differently from a similarly situated entity on the basis of religion, and plaintiff has not met the threshold burden for an equal protection challenge. As a result, the Court of Appeals erred by holding that defendants' denial of plaintiff's variance request violates equal protection principles.

IV. CONCLUSION

We hold that defendants' denial of plaintiff's variance request does not violate equal protection principles because plaintiff has not met the threshold burden of proof for its equal protection challenge by showing disparate treatment of similarly situated entities, nor has plaintiff demonstrated that the variance was denied because of religious animus. Accordingly, we reverse the Court of Appeals judgment and reinstate the trial court's order granting defendants' motion for summary disposition.

---

the ordinance prohibits all schools in the OP zoning district, religious and secular alike. Thus, the ordinance here does not classify on the basis of religion and the rationale in *Vineyard* is inapplicable.

KELLY, C.J., and CAVANAGH, WEAVER, CORRIGAN, YOUNG, and MARKMAN, JJ., concurred with HATHAWAY, J.

APPENDIX B

Michigan Supreme Court
Lansing, Michigan

Order Marilyn Kelly, Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway
Justices

FILED JULY 9, 2009
137443 & (93)

SC: 137443
COA: 272357
Washtenaw CC: 00-001072-AS

SHEPHERD MONTESSORI CENTER MILAN,
Plaintiff-Appellant,

v

ANN ARBOR CHARTER TOWNSHIP,
ANN ARBOR CHARTER TOWNSHIP ZONING
OFFICIAL, and ANN ARBOR CHARTER
TOWNSHIP ZONING BOARD OF APPEALS,
Defendants-Appellees.

On order of the Court, the application for leave to appeal the November 6, 2003 and August 26, 2008 judgments of the Court of Appeals is considered, and it is GRANTED, limited to the issues: (1) whether the Court of Appeals applied the correct standard of review in determining that the defendants violated the plaintiff's right to equal protection; and (2) whether the defendants violated the plaintiff's right to equal protection in denying the plaintiff's request for a variance. The motion to strike the amicus curiae brief is DENIED.

[SEAL]

p0701 I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 9, 2009 /s/ Corbin A. Davis
Clerk

APPENDIX C

STATE OF MICHIGAN
COURT OF APPEALS

FOR PUBLICATION
August 26, 2008
9:00 a.m.

No. 272357
Washtenaw Circuit Court
LC No. 00-001072-AS

ON REMAND
Advance Sheets Version

SHEPHERD MONTESSORI CENTER MILAN,

Plaintiff-Appellant,

v

ANN ARBOR CHARTER TOWNSHIP, ANN ARBOR CHARTER TOWNSHIP ZONING OFFICIAL and ANN ARBOR CHARTER TOWNSHIP ZONING BOARD OF APPEALS,

Defendants-Appellees.

Before: Saad, C.J., and Hoekstra and Smolenski, JJ.

SAAD, C.J.

This case is on remand from our Supreme Court. In *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315; 675 NW2d 271 (2003) (*Shepherd I*), this Court reversed the trial court's grant of summary disposition to defendants on plaintiff's claims that defendants' denial of a variance for plaintiff to use property adjacent to its Catholic Montessori day care center to operate a faith-based school violated 42 USC 2000cc of the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the Equal Protection Clause of the United States Constitution, US Const, Am XIV, § 1, and the Michigan Constitution, Const 1963, art 1, § 2. *Id.* at 318-319. This Court remanded the case for consideration of whether defendants' denial of the variance imposed a "substantial burden" on plaintiff's religious exercise and to consider various aspects of feasibility and economic hardship associated with alternative sites for the school. *Id.* at 329-333. On remand, the trial court again granted summary disposition in defendants' favor.

In the second appeal, *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 275 Mich App 597; 739 NW2d 664 (2007) (*Shepherd II*), we ruled that the trial court failed to correctly apply the "substantial burden" factors as set forth in *Shepherd I*, that defendants' denial of the zoning variance imposed a substantial burden on plaintiff's religious exercise contrary to RLUIPA and, because defendants provided no evidence of a compelling governmental interest, plaintiff was entitled to summary disposition on its RLUIPA claim. *Id.* at 609-610. On plaintiff's equal protection claim, we ruled that defendants treated Rainbow Rascals, a secular entity, more favorably than plaintiff, a religious entity. *Id.* at 613-614. Defendants

conceded that plaintiff and Rainbow Rascals are similarly situated, and defendants offered no reason to justify its refusal to permit plaintiff to operate its faith-based school in the same space that Rainbow Rascals had operated its day care program. *Id.* For these reasons, and because defendant offered no evidence to show that their denial of plaintiff's variance request was narrowly tailored to achieve a compelling governmental interest, we held that plaintiff is entitled to summary disposition on its equal protection claim. *Id.*

In lieu of granting defendants' application for leave to appeal, the Supreme Court vacated our ruling in *Shepherd II*, and remanded the case for reconsideration in light of *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich 373; 733 NW2d 734 (2007), which was decided approximately one month after we decided *Shepherd II*. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 480 Mich 1143 (2008). Specifically, the Supreme Court instructed us to "reconsider whether the denial of the zoning variance imposed a 'substantial burden' on the plaintiff's religious exercise, i.e., whether the denial of the variance "coerce[s] individuals into acting contrary to their religious beliefs." *Id.*, quoting *Greater Bible Way*, 478 Mich at 401 (internal quotation marks and citation omitted).

In *Greater Bible Way*, the plaintiff church alleged violations under RLUIPA after the city of Jackson denied its request to rezone its property from single-family residential to multiple-family residential. *Greater Bible Way, supra*, 478 Mich at 377-378. The plaintiff wanted to build an apartment complex across the street from its church. *Id.* at 377. After a bench

trial, the court found that the defendants had violated RLUIPA and this Court agreed. *Id.* at 378. Our Supreme Court reversed and held that RLUIPA does not apply because a "refusal to rezone the property did not constitute an 'individualized assessment'" under RLUIPA. *Id.* at 391. Although that ruling was dispositive, the Court proceeded to consider whether any violation of RLUIPA had occurred, "[a]ssuming" that RLUIPA applied. *Id.* at 391. The Court addressed whether the city's refusal to rezone the property constituted a "substantial burden" on the plaintiff's religious exercise:

> [W]e believe that it is clear that a "substantial burden" on one's "religious exercise" exists where there is governmental action that coerces one into acting contrary to one's religious beliefs by way of doing something that one's religion prohibits or refraining from doing something that one's religion requires. That is, a "substantial burden" exists when one is forced to choose between violating a law (or forfeiting an important benefit) and violating one's religious tenets. A mere inconvenience or irritation does not constitute a "*substantial* burden." Similarly, something that simply makes it more difficult in some respect to practice one's religion does not constitute a "*substantial* burden." Rather, a "substantial burden" is something that "coerce[s] individuals into acting contrary to their religious beliefs[.]" [*Id.* at 400-401, quoting *Lyng v Northwest Indian Cemetery Protective Ass'n*, 485 US 439, 450; 108 S Ct 1319; 99 L Ed 2d 534 (1988) (emphasis added).]

The Court ruled that Greater Bible Way Temple failed to establish a substantial burden on its religious exercise:

> The city is not forbidding plaintiff from building an apartment complex; it is simply regulating where that apartment complex can be built. If plaintiff wants to build an apartment complex, it can do so; it just has to build it on property that is zoned for apartment complexes. If plaintiff wants to use the property for housing, then it can build single-family residences on the property. In other words, in the realm of building apartments, plaintiff has to follow the law like everyone else.
>
> While [the zoning ordinance] may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, it does not prohibit plaintiff from providing housing. Whatever specific difficulties [plaintiff church] claims to have encountered, they are the same ones that face all [land users]. The city has not done anything to coerce plaintiff into acting contrary to its religious beliefs, and, thus, it has not substantially burdened plaintiff's exercise of religion [*Greater Bible Way, supra,* 478 Mich at 401-402 (quotation marks and citations omitted).]

The Court reversed and remanded for entry of judgment in favor of the defendants.

In light of the Supreme Court's interpretation of RLUIPA, we are compelled to reach a similar result.

As set forth in *Greater Bible Way, supra*, 478 Mich at 400, to establish a RLUIPA violation, plaintiff must show that the denial of the variance request "coerces" individuals into acting contrary to their religious beliefs. Plaintiff did not show that the denial of the variance forces plaintiff to do something that its religion prohibits, or refrain from doing something that its religion requires. Plaintiff did not allege that the property at issue has religious significance or that plaintiff's faith requires a school at that particular site. *Shepherd I, supra*, 259 Mich App at 332. Rather, the evidence suggests that, notwithstanding substantial evidence of prohibitive cost and a lack of available, suitable space, plaintiff *could* operate its school at another location in the surrounding area, and plaintiff conducted a real estate search toward that end. In other words, plaintiff may operate a faith-based school, but it must do so on property that is zoned for schools. *Greater Bible Way, supra,* 478 Mich at 401-402. Under the Supreme Court's reasoning, the denial of the variance does not constitute a substantial burden on plaintiff's religious exercise and, therefore, the trial court correctly granted summary disposition to defendants on the RLUIPA claims.

With regard to plaintiff's equal protection claim, the Supreme Court's remand order does not alter our prior holding that plaintiff is entitled to summary disposition. The Supreme Court instructed us to reconsider our judgment in light of *Greater Bible Way*, which did not involve an equal protection claim and, therefore, the legal analysis in that case does not affect our holding. Defendants conceded that plaintiff and Rainbow Rascals were similarly situated, and defendants failed to offer a reason for refusing to

permit plaintiff to operate its school in the same space that Rainbow Rascals had operated its day care program. *Shepherd II, supra*, 275 Mich App at 613-614. Further, defendants offered no evidence to show that their denial of plaintiff's variance request was narrowly tailored to achieve a compelling governmental interest. *Id.* at 614. As we explained in *Shepherd II*:

> Evidence established that defendants denied plaintiff a variance to operate an educational program in the same space formerly occupied by the similarly situated Rainbow Rascals, notwithstanding that there would be far fewer children in the school and that it would cause fewer traffic and density problems. Indeed, as clarified at oral argument on appeal, after several years of litigation it is unrebutted that defendants have not offered a reason to plaintiff why it was denied the opportunity to operate its school in the identical space that Rainbow Rascals operated its daycare program. Thus, we hold that defendants have treated a secular entity more favorably than plaintiff, a religious entity. The burden then shifted to defendants to show that their denial of plaintiff's variance was precisely tailored to achieve a compelling governmental interest, *Shepherd I, supra* at 334, and defendants offered no evidence or argument on this point. Accordingly, the trial court erred when it failed to grant summary disposition to plaintiff. [*Id.* at 613-614.]

Accordingly, though the Supreme Court's holding in *Greater Bible Way* compels us to affirm the trial court's grant of summary disposition to defendants on

plaintiff's RLUIPA claim, we reaffirm our holding that the application of the zoning ordinance violated the equal protection guarantee of the United States Constitution. In light of this violation, the decision of the Ann Arbor Charter Township Zoning Board of Appeals "was contrary to law and the trial court erred when it affirmed the [zoning board of appeals] denial of plaintiff's request for a variance." *Shepherd II, supra*, 275 Mich App at 614. Again, therefore, "[w]e remand this case to the trial court to enter judgment in favor of plaintiff and to reverse the [zoning board of appeals] denial of plaintiff's variance request." *Id.* We retain jurisdiction.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski

APPENDIX D

Michigan Supreme Court
Lansing, Michigan

Order Clifford W. Taylor, Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway
Justices

FILED MARCH 28, 2008
134739
134978

SC:134739
COA: 272357
Washtenaw CC: 00-001072-AS

SHEPHERD MONTESSORI CENTER MILAN,
Plaintiff-Appellee,

v

ANN ARBOR CHARTER TOWNSHIP,
ANN ARBOR CHARTER TOWNSHIP ZONING OFFICIAL, and ANN ARBOR CHARTER TOWNSHIP ZONING BOARD OF APPEALS,
Defendants-Appellants.

SC:134978
COA: 272357
Washtenaw CC: 00-001072-AS

SHEPHERD MONTESSORI CENTER MILAN,
Plaintiff-Appellee,

v

ANN ARBOR CHARTER TOWNSHIP, ANN ARBOR CHARTER TOWNSHIP ZONING OFFICIAL, and ANN ARBOR CHARTER TOWNSHIP ZONING BOARD OF APPEALS,
Defendants-Appellants.

On order of the Court, the application for leave to appeal the May 22, 2007 judgment and the application for leave to appeal the August 21, 2007 order of the Court of Appeals are considered. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we VACATE the May 22, 2007 judgment of the Court of Appeals and we REMAND this case to the Court of Appeals for reconsideration in light of *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich 373 (2007). In particular, the Court of Appeals should reconsider whether the denial of the zoning variance imposed a "substantial burden" on the plaintiff's religious exercise, i.e., whether the denial of the variance "coerce[s] individuals into acting contrary to their religious beliefs." *Id.* at 401. "A mere inconvenience or irritation" or "something that simply makes it more difficult in some respect to practice one's religion does not constitute a 'substantial burden.'" *Id.* In addition, we REVERSE the August 21, 2007 order of the Court of Appeals awarding plaintiff

sanctions for a vexatious motion for reconsideration. Given the facts and the law at issue in this case, the Court of Appeals clearly erred in imposing such sanctions.

CAVANAGH, J., would grant leave to appeal.

KELLY, J., dissents and states as follows:

I would not remand this case to the Court of Appeals for reconsideration in light of *Greater Bible Way Temple of Jackson v City of Jackson*,[1] for the reasons stated in my concurrence in that case. Rather, I would grant leave to appeal to consider whether the denial of a variance implicates the Religious Land Use and Institutionalized Persons Act.[2] If it does, we should determine whether it imposes a substantial burden on plaintiff's exercise of its religious beliefs.

[SEAL]

p0325 I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 28, 2008 /s/ Corbin A. Davis
Clerk

---

[1] 478 Mich 373 (2007).

[2] 42 USC 2000cc *et seq.*

APPENDIX E

COURT OF APPEALS, STATE OF MICHIGAN

Docket No. 272357
LC No. 00-001072-AS

[Filed August 21, 2007]

Henry William Saad
Presiding Judge

Joel P. Hoekstra

Michael R. Smolenski
Judges

Shepherd Montessori Center Milan	)
	)
v	)
	)
Ann Arbor Charter Twp	)
	)

ORDER

The motion for damages for the vexatious proceeding of filing the motion for reconsideration is GRANTED. MCR 7.216(C)(1).

Plaintiff is entitled to an award of costs and attorney's fees in an amount to be determined by the trial court.

This matter is REMANDED to the trial court for a determination of actual damages and attorney's fees. MCR 7.216(C)(2). We retain jurisdiction.

Judge Hoekstra would deny plaintiff's motion.

[SEAL] A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

Aug 21 2007 /s/ Sandra Schultz Mengel
Date Chief Clerk

APPENDIX F

COURT OF APPEALS, STATE OF MICHIGAN

Docket No. 272357
LC No. 00-001072-AS

[Filed July 13, 2007]

Henry William Saad
Presiding Judge

Joel P. Hoekstra

Michael R. Smolenski
Judges

Shepherd Montessori Center Milan	)
	)
v	)
	)
Ann Arbor Charter Twp	)
	)

ORDER

The Court orders that the motion for reconsideration is DENIED.

[SEAL] A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

Jul 13 2007	/s/ Sandra Schultz Mengel
Date	Chief Clerk

APPENDIX G

STATE OF MICHIGAN
COURT OF APPEALS

FOR PUBLICATION
May 22, 2007
9:00 a.m.

No. 272357
Washtenaw Circuit Court
LC No. 00-001072-AS

Official Reported Version

SHEPHERD MONTESSORI CENTER MILAN,

Plaintiff-Appellant,

v

ANN ARBOR CHARTER TOWNSHIP, ANN ARBOR CHARTER TOWNSHIP ZONING OFFICIAL and ANN ARBOR CHARTER TOWNSHIP ZONING BOARD OF APPEALS,

Defendants-Appellees.

Before: Saad, P.J., and Hoekstra and Smolenski, JJ.

SAAD, P.J.

Plaintiff appeals the trial court's order that granted summary disposition to defendants after this Court remanded this case in *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315; 675 NW2d 271 (2003) (*Shepherd I*). After remand, the trial court again ruled that plaintiff did not show a violation of 42 USC 2000cc of the Religious Land Use and Institutionalized Persons Act (RLUIPA) and that plaintiff did not show evidence of discrimination to support its equal protection claim. We reverse and remand for entry of judgment in favor of plaintiff.

I. Facts and Procedural History

This Court summarized the facts before remand in *Shepherd I*, *supra* at 321-323:

> This case originated from a zoning dispute in Ann Arbor Charter Township. Plaintiff had a leasehold interest in the Domino's Farms Office Park and operated a Catholic Montessori day care program. In April 2000, plaintiff notified the township of its intention to lease additional property immediately adjacent to its day care facility and to operate a Catholic Montessori school for children grades K-3. Plaintiff anticipated that twenty-five students would be attending this school. Plaintiff hoped to utilize space that had been occupied by the "Rainbow Rascals," (a non-religious, pre-school day care program), which previously had received approval from the defendants to accommodate up to one hundred students.
>
> The property at issue is zoned "OP" (office park district) pursuant to the township zoning

ordinance. The township zoning ordinance expressly permitted the operation of day care centers within the OP district, but only for children of office park employees. Plaintiff requested in writing a zoning determination from the township regarding whether plaintiff's proposed use of the property would be allowed under the township's ordinance. In a letter dated May 1, 2000, the zoning official for the township informed plaintiff that the zoning ordinance classified its proposed use as "primary school." The letter informed plaintiff that primary schools were not listed as permitted uses in OP districts and denied plaintiff's proposed use of the property.

On May 30, 2000, plaintiff filed a petition with the Ann Arbor Charter Township Zoning Board of Appeals (ZBA) appealing the zoning official's decision. Plaintiff sought the following: (1) a reversal of the zoning official's determination so as to allow the proposed use; (2) a use variance; and (3) a determination that plaintiff's proposed use as a primary school be considered a "substituted use" of the Rainbow Rascals day care program. With respect to plaintiff's second request in the May 30 petition, plaintiff noted that defendants had granted a use variance to Rainbow Rascals on December 3, 1991, which permitted an expanded use of the premises to allow children of non-office park employees to attend the Rainbow Rascals day care program. As mentioned, the original zoning ordinance allowed the operation of a day care facility in an area zoned OP only for use by children of office park employees. With respect

to plaintiff's third request in its May 30 petition, plaintiff argued that its primary school should be considered a substitution of the day care program. Plaintiff noted that the proposed use of the property would be low impact and would involve less density than the currently approved use. Plaintiff emphasized that its proposed use would be for twenty-five students.

A hearing on plaintiff's petition was held on June 26, 2000. The ZBA rejected plaintiff's appeal. The ZBA held that plaintiff's proposed use of the property for a primary school could not be considered a substitution of a non-conforming use. The ZBA determined that because Rainbow Rascals had received a variance, its use of the premises became a conforming and permitted use in the OP district. Therefore, plaintiff's use would be non-conforming and a substitution was not permitted. The ZBA then determined that a primary school was not a permitted use in an area zoned OP. Finally, the ZBA denied plaintiff's request for a use variance because plaintiff failed to make the requisite showing that without the variance, there could be no viable economic use of the property.

On September 22, 2000, plaintiff filed the instant lawsuit. The complaint alleged: violations of RLUIPA . . . and equal protection

> . . . .[1] Plaintiff also filed a motion requesting a preliminary injunction.
>
> On January 16, 2001, the trial court granted defendants' motion for summary disposition [and] denied plaintiff's motions for summary disposition . . . .

Under 42 USC 2000cc, defendants may not impose a substantial burden through land use regulation on a person or religious entity's religious exercise unless defendants have a substantial governmental interest and the regulation is the least restrictive means to achieve that interest. In *Shepherd I*, *supra* at 327-329, this Court held that plaintiff had satisfied the jurisdictional requirement of RLUIPA found in 42 USC 2000cc(a)(2)(C) and that plaintiff's use of the property for religious education was a religious exercise within the meaning of RLUIPA. In *Shepherd I*, this Court remanded plaintiff's RLUIPA claim for a determination whether defendants' denial of plaintiff's variance placed a substantial burden on plaintiff's religious exercise, and instructed the parties to address

> [1] whether there are alternative locations in the area that would allow the school consistent with the zoning laws; [2] the actual availability of alternative property, either by sale or lease, in the area; [3] the availability of property that would be suitable for a K-3 school; [4] the

---

[1] Plaintiff raised other claims, but this Court affirmed the trial court's dismissal of those counts, *Shepherd I*, *supra* at 348, and none is pertinent to this appeal.

> proximity of the homes of parents who would send their children to the school; and [5] the economic burdens of alternative locations. [*Id.* at 332-333.]

On remand, the trial court found in favor of defendants on each factor, granted defendants' motion for summary disposition, and denied plaintiff's motion for summary disposition. With regard to plaintiff's equal protection claim, this Court had ruled that the trial court erred when it granted defendants' motion for summary disposition because genuine issues of material fact remained. *Id.* at 337. On remand, the trial court once again concluded that plaintiff had failed to demonstrate a genuine issue of material fact to establish a prima facie equal protection claim.

II. Analysis

A. RLUIPA Claim

Plaintiff maintains that the trial court erroneously dismissed its RLUIPA claim after the trial court ruled that other properties were actually available for plaintiff to operate a school for students from kindergarten through third grade.[2] Plaintiff asserts

---

[2] We review de novo a trial court's decision on a motion for summary disposition. *Shepherd I*, *supra* at 324. "The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law." *Id.* In reviewing a decision under MCR 2.116(C)(10), we consider all documentary evidence in the light most favorable to the nonmoving party to determine whether there is any genuine issue of material fact that would entitle the moving party to judgment as a matter of law. *Knauff v Oscoda Co Drain*

that, after the remand, it presented evidence that there were no other available properties in the area for it to operate the school within its budget and that defendants offered no documentary evidence to rebut plaintiff's evidence.

Plaintiff presented an affidavit from a vice president of the Ave Maria Foundation in which he stated that he had looked for property in the Ann Arbor Township area and that none was suitable and listed 24 properties in the surrounding area that were either too large, too expensive, or not available for sale or lease. The trial court opined, however, that this evidence was insufficient and that the vice president's search was not rigorous enough. When considering a motion for summary disposition, a court may not weigh the evidence or assess credibility. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005). The trial court essentially concluded that it did not believe the vice president's assertions that no other properties were available, but it gave no reasons for this finding other than that the search was not extensive enough. The court nonetheless made the affirmative finding that other properties were both

---

Comm'r, 240 Mich App 485, 488; 618 NW2d 1 (2000); *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357-358; 597 NW2d 250 (1999). "'[A] court may not weigh the evidence before it or make findings of fact; *if the evidence before it is conflicting*, summary disposition is improper.'" *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005), quoting *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299; 662 NW2d 108 (2003) (emphasis in original). "[T]his Court will be liberal in finding a genuine issue of material fact that requires a trial to resolve." *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005).

available and suitable for plaintiff. The trial court had no basis, in law or fact, for this conclusion when plaintiff presented documentary evidence that no suitable property was available and defendants presented no evidence in response.

The trial court asserted that plaintiff's previous school in Milan would have been acceptable, and defendants argue, without citing any record evidence, that the Milan space is available for plaintiff's use.[3] However, plaintiff presented evidence, and the trial court expressly found, that the church that owned the Milan property did not renew plaintiff's lease of the space because the church wanted to use the space for offices and other ministries.[4] Though defendants point

---

[3] This Court need not consider allegations made by a party when the party fails to cite where the record would support those allegations. See MCR 7.212(C)(7) ("Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court."); see also *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004) (holding that this Court "will not search the record for factual support for plaintiffs' claims").

[4] Defendants argue that much of plaintiff's evidence should not be believed because the entities and witnesses were associated with the Ave Maria Foundation and Thomas Monaghan. For example, defendants refer to the Muirfield Corporation, which searched for property for plaintiff, as "a front for Monaghan and the Ave Maria Foundation." The trial court also stated that "the Ave Maria Foundation, whether through the Muirfield Corporation or directly, made its extensive resources available to buy property *ostensibly* for [plaintiff]" (emphasis added). However, the trial court could not properly disregard this evidence on the basis of these concerns because a court considering a motion for summary disposition may not weigh the evidence or assess credibility. *In re Handelsman*, *supra* at 437.

out that plaintiff had other motivations unrelated to religious practice for moving to Ann Arbor, these allegations simply do not establish that the Milan site remains available. Thus, the suitability of the Milan space is irrelevant to whether other suitable properties were, in fact, *available*.

The trial court also ruled that the location at issue here is not itself essential to plaintiff's religious exercise because "[i]t is apparent from [the testimony of the Milan school's principal, Naomi Corera] that she simply had her heart set on staying in the Office Park because of her personal preferences and for the sake of convenience." While Ms. Corera may have preferred the property for personal reasons, defendants presented no evidence that plaintiff could have gone elsewhere after their Milan lease was not renewed. Moreover, whether this property in particular would be essential to plaintiff's religious exercise is not one of the factors listed in *Shepherd I*, and the trial court erred in reading this requirement into the third factor, "the availability of property that would be suitable for a K-3 school," *Shepherd I*, *supra* at 333, and in concluding that the third factor was not met because the property was not essential; this line of reasoning simply does not address the third factor.

The trial court may have read this requirement into RLUIPA pursuant to *Greater Bible Way Temple of Jackson v City of Jackson*, 268 Mich App 673, 681-682; 708 NW2d 756 (2005), in which this Court considered whether the defendants violated RLUIPA when the plaintiff sought to build low-income housing units at a greater population density than allowed by the applicable zoning. Though this Court reasoned that the plaintiff's religious exercise was substantially

burdened because the property at issue was essential to the plaintiff's need to create housing near its church, *id.*, this reasoning does not create any dispositive requirement under RLUIPA that the particular property must itself be necessary for the plaintiff's religious exercise. In other words, the essential nature of the property in *Greater Bible Way* was at most *evidence* of a substantial burden, not an element of it. Nothing in the text of RLUIPA requires a finding that the disputed property must be essential to religious exercise as opposed to other property, so the trial court erred in reading this requirement into the plain language of RLUIPA.[5] Further, plaintiff's situation is similar to Greater Bible Way in this regard because a chapel for Mass and other religious activities for Catholic school students are necessary to their religious exercise.[6]

The trial court also opined that plaintiff could in fact find other property suitable for use as a primary school because it had access to abundant financial resources through the Ave Maria Foundation and

---

[5] In determining the meaning of a federal statute, courts ascertain the intent of Congress by looking to the language of the statute itself, and if the language is clear, the inquiry is complete. *Brilliance Audio, Inc v Haights Cross Communications, Inc*, 474 F3d 365, 371 (CA 6, 2007). Also, courts may not add anything to the plain meaning of a federal statute. *Telespectrum, Inc v Kentucky Pub Service Comm*, 227 F3d 414, 421 (CA 6, 2000).

[6] To support its finding that Ms. Corera favored the disputed property as a matter of mere personal preference and convenience, the trial court cited her testimony that the property was better suited as a Catholic school than the Milan space because plaintiff could hold Mass and other religious activities for students in the chapel.

could even buy one of the properties that it listed as having an unsuitable building and then tear down the building and rebuild. It further reasoned that "it is appropriate to weigh the Ave Maria Foundation's contributions as part of [plaintiff's] financial resources" because "Ms. Corera testified . . . that [plaintiff] supported itself to the best of its ability but that the Ave Maria Foundation provided whatever funds were necessary to operate the school[.]" The trial court cited no authority for its decision to deviate from what it called the normal rule that "the existence of well-funded corporate entities owned by the principal(s) of the plaintiff organization would not be relevant to whether the plaintiff has the financial resources to accomplish its goal."[7]

Moreover, though the trial court opined that "the Ave Maria Foundation . . . made its extensive

---

[7] The trial court's reasoning suggests that it may have intended to apply a variant of the doctrine of piercing the corporate veil. Piercing the corporate veil is an equitable principle that requires a finding that a subsidiary is a mere instrumentality of the parent, that the subsidiary was used to commit a wrong or fraud, and that there was "an unjust injury or loss to the plaintiff." *Rymal v Baergen*, 262 Mich App 274, 293-294; 686 NW2d 241 (2004). This doctrine is not applicable to this zoning dispute. And, were we to conclude that the doctrine could be invoked, it does not apply as a matter of law because it cannot be reasonably argued that defendants suffered an "unjust injury or loss" by any alleged fraud by plaintiff; defendants do not argue that they would suffer any harm by plaintiff educating up to 25 primary students on the property, and the zoning board granted a variance to the previous occupants, Rainbow Rascals, to enroll up to 100 children in its day-care program on the same parcel. The trial court further erred in relying on the doctrine of piercing the corporate veil because such a decision inherently required a finding of fraud or wrongdoing, and there was simply no showing of either.

resources available to buy property ostensibly for [plaintiff]," the foundation's president testified that it had sought to make plaintiff self-sufficient so that plaintiff would need no additional funds besides tuition and funds raised through its own fund raising. The Ave Maria Foundation's executive director testified that the foundation did not have any plans to provide plaintiff with lease support either in its current location or if plaintiff moved from the subject property. The trial court was required to consider the evidence in the light most favorable to plaintiff before granting summary disposition for defendants, *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 488, 618 NW2d 1 (2000), and given the testimony that plaintiff could not rely on lease support from the Ave Maria Foundation, the trial court erred in this regard. Further, Ms. Corera testified that failure to meet expenses through tuition and grants would require her to raise tuition, which could in turn render a Catholic education unaffordable for some parents, so the trial court erred in concluding as a matter of law that the cost of other property could essentially have no effect on plaintiff's religious exercise.[8]

With respect to the final factor, "the economic burdens of alternative locations," *Shepherd I*, *supra* at 333, the trial court stated:

---

[8] The trial court also erred when it found that plaintiff offered or considered offering as much as $880,000 to the Knights of Columbus for one property. There is simply no evidence that plaintiff considered offering $880,000 because plaintiff showed by affidavit that it had inquired about the property, that the Knights of Columbus could not reach a consensus, and that even if it had, the cost of over $800,000 would have been beyond plaintiff's resources.

> Courts have held with good reason that inconvenience and/or high cost of real property in a particular area should not suffice to establish a substantial burden. . . . [I]t will always be relatively easy for a plaintiff . . . to articulate *some* ostensibly logical reason for rejecting any property but the property in dispute." [Emphasis in original.]

We hold that the trial court failed to apply the law of the case when it considered caselaw from other jurisdictions to determine that real estate costs or market conditions could not place a substantial burden on plaintiff's religious exercise. In *Shepherd I*, this Court specifically instructed the parties and the trial court to address whether the economic burden of alternative locations placed a substantial burden on plaintiff's religious exercise. *Shepherd I*, *supra* at 333. "[A]n appellate court's determination of an issue in a case binds lower tribunals on remand . . . ." *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). Though defendants argue that the trial court did in fact address this factor, rather than applying the law of the case and considering the economic impact on plaintiff, the trial court noted that other jurisdictions have held that real estate costs attributable to zoning cannot create a substantial burden under RLUIPA. While the trial court also acknowledged that this Court has held differently from courts in other jurisdictions, it then distinguished this case from *Greater Bible Way* for reasons already discussed. Thus, although the trial court may have discussed this critical factor, the practical effect of the trial court's analysis is that it failed to follow this Court's ruling in *Shepherd I*. Moreover, even if this case is distinguishable from *Greater Bible Way*, the

trial court improperly considered caselaw from other jurisdictions that rendered meaningless this Court's remand instruction to consider "the economic burdens of alternative locations." *Shepherd I*, *supra* at 333. The trial court could conceivably have looked to other cases for guidance to apply this factor, but it is disturbing that the trial court's approach rendered this Court's remand instruction meaningless.[9]

Also, plaintiff maintains that the trial court should have granted summary disposition to plaintiff on its RLUIPA claim. We agree. On the evidence presented, reasonable minds could not differ that plaintiff could not afford any of the listed properties. Ms. Corera testified that she would not start any program unless the tuition itself could fund it and that it was a struggle to meet the rent of about $40,000 a year. Defendants have not argued or established that plaintiff could have afforded any of the listed properties at $40,000 a year and, as discussed, have not shown any justification for looking to the Ave Maria Foundation's resources to establish this point.

Further, though defendants characterize the affidavit of the foundation's vice president as not credible, defendants failed to present any evidence to rebut his factual assertions about the availability, suitability, or affordability of other area properties. Once a moving party properly supports its motion with documentary evidence, "the nonmoving party must

---

[9] We also are not bound by any of the decisions from other jurisdictions regarding RLUIPA that the trial court cited in its opinion or that defendants cite in their initial appellate brief or as supplemental authority. See *Shepherd I*, *supra* at 325 n 2.

respond with documentary evidence setting forth specific facts showing that there is a genuine issue for trial." *Richardson v Michigan Humane Society*, 221 Mich App 526, 527; 561 NW2d 873 (1997). And, though the trial court concluded that the affidavit was too "vague and conclusory," and failed to explain why the properties were unsuitable or too expensive, and failed to provide asking prices, plaintiff also submitted to the trial court an extensive binder containing explanations why many of the properties were unsuitable or too expensive and providing plaintiff's purchase offers (along with asking prices) for the named properties and other information. Far from being vague and conclusory, the exhibit indicated that certain properties with buildings ranging from 14,000 to 20,000 square feet were too large and expensive for a primary school for 25 children and specifically addressed why the costs for many of the buildings exceeded plaintiff's resources. Moreover, the trial court also erroneously stated that plaintiff offered no explanation of its finances. Again, Ms. Corera testified at length regarding plaintiff's financial need to cover its expenses with tuition and to keep tuition low by paying $40,000 annually in rent or risk losing students because of increased tuition. The trial court erred by disregarding this evidence and by failing to conclude, on the basis of the evidence presented, that reasonable minds could not differ that the denial of plaintiff's variance substantially burdened plaintiff's religious exercise.

Under 42 USC 2000cc, if a plaintiff establishes a substantial burden on its religious exercise, defendants have the burden of showing a compelling governmental interest. See 42 USC 2000cc(a)(1)(A) (stating that a land-use regulation may not

substantially burden the religious exercise of a person, including a religious entity, "unless *the government demonstrates*" a compelling governmental interest) (emphasis added). Defendants presented no evidence that they had a compelling governmental interest requiring them to deny plaintiff's variance, and, therefore, the trial court should have granted summary disposition to plaintiff on its RLUIPA claim.

B. Equal Protection Claim

Plaintiff also contends that the trial court erred when it denied plaintiff's motion for summary disposition on its equal protection claim and granted summary disposition to defendants. We agree. The trial court reasoned that, though this Court had previously held that plaintiff provided sufficient evidence to survive summary disposition before discovery, plaintiff's evidence did not create a genuine issue of material fact after the case was remanded and the parties had the benefit of discovery. However, nothing in *Shepherd I* even arguably suggests that the lack of discovery factored into this Court's conclusion that plaintiff had presented a genuine issue of material fact on its equal protection claim. In contrast to the RLUIPA count, which this Court expressly held could not be resolved without additional documentary evidence, this Court held with respect to the equal protection count that a genuine issue of material fact remained because plaintiff and Rainbow Rascals *could* be considered similarly situated, and it did not hold that the record was incomplete. *Id.* at 333, 337. This Court opined:

> At the very least, we are not persuaded that plaintiff's request for a variance required any

> more of a deviation from the zoning ordinance than the variance granted to Rainbow Rascals. Given that Rainbow Rascals was a secular day care center, whereas plaintiff's proposed use involved religious education, reasonable minds could differ with regard to whether plaintiff and Rainbow Rascals were similarly situated. Therefore, the trial court erred in granting defendants' motion for summary disposition on plaintiff's equal protection claim because genuine issues of material fact remain. [*Id.* at 337.]

Defendants have neither argued nor provided evidence that plaintiff's request for a variance would require any more of a deviation from the zoning ordinance than the variance granted to Rainbow Rascals. Thus, it was the law of the case that "reasonable minds could differ with regard to whether plaintiff and Rainbow Rascals were similarly situated," *id.*, and the trial court should not have granted summary disposition to defendants.[10]

The trial court also held that although Rainbow Rascals had received a variance, "the variance had nothing to do with the number of students or level of education. . . . [The variance allowed] children other than children of [office park] employees to use

---

[10] Although the trial court emphasized that Ms. Corera testified after remand that she had not personally experienced discriminatory bias by defendants, requiring plaintiff to provide direct evidence in this regard is inherently inconsistent with this Court's prior opinion that a genuine issue of material fact may be established through circumstantial evidence. *Bergen v Baker*, 264 Mich App 376, 387; 691 NW2d 770 (2004).

Rainbow Rascals day care—the exact same variance that [plaintiff] itself received . . . ." This reasoning also failed to apply the law of the case because this Court had already rejected the trial court's previous and essentially identical holding when this Court held that "plaintiff did argue that it was treated differently from the Rainbow Rascals day care center in that plaintiff wanted to use the property to educate only twenty-five children, whereas Rainbow Rascals was permitted to use the premises for up to one hundred children." *Shepherd I, supra* at 336.[11]

The trial court should have granted summary disposition to plaintiff. Though this Court observed that issues of fact remain about whether plaintiff and Rainbow Rascals were similarly situated, defendants concede on appeal that "[t]he similarity of the two entities is not in dispute." Evidence established that defendants denied plaintiff a variance to operate an educational program in the same space formerly occupied by the similarly situated Rainbow Rascals, notwithstanding that there would be far fewer children in the school and that it would cause fewer traffic and density problems. Indeed, as clarified at oral argument on appeal, after several years of litigation it is unrebutted that defendants have not offered a reason to plaintiff why it was denied the opportunity to operate its school in the identical space that Rainbow

---

[11] We reject defendants' argument that the zoning board granted plaintiff the same variance that it granted to Rainbow Rascals when it allowed plaintiff to enroll children in its day-care center next door to the subject property. Again, the board allowed a secular entity to enroll up to 100 children in day care on the subject property and denied plaintiff's request to enroll up to 25 students on the same property.

Rascals operated its day-care program. Thus, we hold that defendants have treated a secular entity more favorably than plaintiff, a religious entity.[12] The burden then shifted to defendants to show that their denial of plaintiff's variance was precisely tailored to achieve a compelling governmental interest, *Shepherd I*, *supra* at 334, and defendants offered no evidence or argument on this point. Accordingly, the trial court erred when it failed to grant summary disposition to plaintiff.

We reverse the trial court's grant of summary disposition to defendants on plaintiff's RLUIPA and equal protection claims, and we reverse the trial court's denial of summary disposition to plaintiff on its RLUIPA and equal protection claims. Because defendants violated RLUIPA and the application of the zoning ordinance violated the equal protection guarantee of the United States Constitution, the ZBA's decision was contrary to law and the trial court erred when it affirmed the ZBA's denial of plaintiff's request for a variance. We remand this case to the trial court to enter judgment in favor of plaintiff and to reverse

---

[12] The trial court also reasoned that defendants had no obligation to show that plaintiff's use of the space would cause any density or traffic problems until plaintiff met its burden of showing that there was no other reasonable conforming use under the zoning use. Though such a showing might be relevant under a takings analysis, we are not aware of any theory under which these considerations would apply to an equal protection claim. This spurious analysis, along with the others outlined above and coupled with the trial court's failure to comply with this Court's instructions in Shepherd I, strongly suggests that the trial court simply sought to reaffirm its earlier holding.

the ZBA's denial of plaintiff's variance request. We retain jurisdiction.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski

APPENDIX H

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

Case No. 00-1072 AS
Honorable Melinda Morris

[Filed July 26, 2006]

SHEPHERD MONTESSORI CENTER MILAN, a Michigan non-profit corporation,

Plaintiff,

vs

ANN ARBOR CHARTER TOWNSHIP, ANN ARBOR CHARTER TOWNSHIP ZONING OFFICIAL and ANN ARBOR CHARTER TOWNSHIP ZONING BOARD OF APPEALS,

Defendants.

ROBERT L. BUNTING (P24212)
Attorney for plaintiff
P.O. Box 7
Oxford, MI 43371

ROBERT CHARLES DAVIS (P40155)
Co-counsel for plaintiff

12900 Hall Road, Suite 350
Sterling Heights, MI 48313-1151
(586) 726-1000

BODMAN, LONGLEY & DAHLING LLP
James J. Walsh (P27454)
G. Christopher Bernard (P57939)
110 Miller, Suite 300
Ann Arbor, MI 48104
(734) 761-3780

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION AND DENYING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

At a session of the Court held in the
Washtenaw County Courthouse in
the City of Ann Arbor on
July 26, 2006

PRESENT: HONORABLE MELINDA MORRIS,
Circuit Judge

Plaintiff filed this action against defendants Ann Arbor Charter Township, Ann Arbor Charter Township Zoning Official and the Ann Arbor Charter Township Zoning Board of Appeals (ZBA) (collectively, "the Township"), asserting claims of constitutional violations, a violation of the Religious Land Use and Institutionalized Persons Act, 42 USC 2000cc (RLUIPA), and appealing the ZBA's denial of plaintiff's request for a use variance. This Court denied plaintiff's motion for summary disposition and

preliminary injunction and granted defendants' motion for summary disposition, dismissing plaintiff's complaint in its entirety. Plaintiff appealed, and the Court of Appeals reversed this Court's rulings on plaintiff's RLUIPA claim and claim of appeal from the ZBA decision, concluding that genuine issues of material remained in dispute as to those claim, and remanded to this Court for further proceedings consistent with its opinion.

The parties proceeded with discovery and have again filed cross motions for summary disposition. For the reasons stated below, plaintiff's motion for summary disposition is denied, and defendants' is granted.

I. BACKGROUND

Plaintiff Shepherd Montessori Center Milan is a non-profit organization that operates a Montessori day care center in the Domino Farms Office Park in Ann Arbor Township. The day care center is part of a network of Catholic schools developed, beginning in 1992, and supported by the Ave Maria Foundation and Thomas Monaghan. According to Naomi Corera, a former principal of and now teacher at Shepherd Montessori, there was no division, as a practical matter, between the Ave Maria Foundation and the board of directors of Shepherd Montessori.

Ms. Corera initially was hired to work at St. Michael's, a K-8 school that was one of the Ave Maria Foundation's network of Catholic schools. In September 1994, St. Michael's was moved to a new facility and became the Spiritus Sanctus school, with Ms. Corera installed as principal. In 1997, Mr.

Monaghan replaced the Spiritus Sanctus administration, including Ms. Corera, with a Group of Dominican nuns. This left Ms. Corera without a job, so Mr. Monaghan helped her start a Catholic Montessori preschool, Shepherd Montessori.

Although Ms. Corera preferred to be in Ann Arbor, Shepherd Montessori initially opened in Milan, Michigan. Within three or four years, it was accepting students from pre-kindergarten through third or fourth grade. Because of Ms. Corera's continuing desire to be in Ann Arbor rather than Milan, another Shepherd Montessori preschool was opened in Domino Farms in the fall of 1998. Ms. Corera administered both the Milan and the Domino Farms facilities, with the main office located at Domino Farms. When people called to ask whether Shepherd Montessori ran a primary school, Ms. Corera would tell them that although Shepherd Montessori Ann Arbor had only a pre-school, the Milan location did have a primary school.

Plaintiff leased the space for its day care from Domino Farms Office Park, L.L.C. A central part of plaintiff's approach to education is its emphasis on Catholic religious traditions, beliefs and scriptures.[1] Prior to April 2000, the space across the hall from the Montessori day care was occupied by another day care facility, Rainbow Rascals.

---

[1] Plaintiff's proposed school would be Catholic and emphasize Catholic/Christian religious values and practices; many Montessori schools, however, are non-denominational/non-religious, and some are religious but focus on other forms of Christianity. Catholicism is central to the Shepherd Montessori, but not to the Montessori method of education.

The Office Park is designated as OP ("Office Park"') under the Township's zoning ordinance. The permitted accessory uses in the Office Park include day care facilities for the children of employees who work in the Office Park only; they do not include day care facilities open to the general public or elementary schools. While both day care centers were in operation at Domino Farms, each obtained a variance allowing it to enroll children of the general public, as well as those of employees working in the office Park, to increase enrollment.

In April 2000, plaintiff notified the Township that it intended to use the space formerly occupied by Rainbow Rascals to start a new primary school (K-3) for 25 children who had attended Shepherd Montessori day care and now were ready to move to the next functional grade levels. Rainbow Rascals had been approved to care for up to 100 children in that space. At the time plaintiff contacted the Township about taking up the Rainbow Rascals space, Shepherd Montessori Milan offered classes for students up to the third grade in its Milan location.

The Township informed plaintiff that a school was not a permitted use in the OP district. Plaintiff petitioned the Township Zoning Board of Appeals (ZBA) to reverse the zoning official's decision, grant plaintiff a use variance, or grant plaintiff status as a substituted non-conforming use. At the hearing before the ZBA, no objections to the proposed use were raised on the basis of increased intensity of use, such as inadequate parking, possible traffic problems, etc. The ZBA denied plaintiff' petition and plaintiff filed the present law suit.

Between 1996 and 2006, the Ave Maria Foundation of Ann Arbor, Michigan, through its vice president Gordon Leipold, conducted research looking for properties in the Ann Arbor Township area that would be available for use by Shepherd Montessori as an elementary school. In an affidavit submitted with plaintiff's motion for summary disposition, Mr. Leipold provides a summary of this investigation and results. None of the 17 properties described was suitable, in his eyes, because each was too large, too expensive, not for sale and/or "inappropriate" with regard to accessibility:

3875 Golfside	Too large Too expensive
4101 Joy	Too large Not for sale/lease
115 N. Park, Ypsilanti (1/2001)	Not for sale
720, 722 Lowell (11/1998)	Not for sale
Hitchingham Road (6,7/2004)	Too expensive (because no services)
Pontiac Tr./6 Mile	Too large/small Not "appropriate" w/r/t demographics and accessibility
Knights of Columbus (2/2000)	Not for sale Too expensive

103 N. Park	Not for sale
204 N. Street	Not for sale
Prospect and Ford	Too expensive(?) ("several dilapidated apartments" so it "did not make sense for Shepherd's use")
5591 Maple Rd., Saline (11/1998)	Too expensive ("creek posed a major problem for developing")
Austin Road	Too large (vacant land)
14228 E. Old US12	Not for sale or too expensive ("deal never closed")
M52 (Chelsea)	Not easily accessible ("north of downtown Chelsea")
Mooreville Road	Not for sale
921 Arkona Road	Not for sale
1600 Via Sacra	Too large Too expensive
0 Mooreville, Milan (11/2000)	Too expensive? (not addressed in affidavit)

Plaintiff's Exhibit 14 identifies a total of 24 properties that were considered and rejected for one or more of

the same reasons. Plaintiff searched for properties within about twenty miles from the Office Park, including locations in Milan, Saline, York Township, Superior Township, Livingston County, Ypsilanti, Chelsea and Ann Arbor.

In 2003 or 2004, Shepherd Montessori Milan closed because the church from which the school rented its space decided the space was necessary for expansion of the church office and other needs.

II. ANALYSIS

A. Standard of review

Both parties' motions have been brought pursuant to MCR 2.116(C)(10). MCR 2.116 permits a party to move for dismissal of or judgment on all or part of a claim where there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(B)(1), 2.116(C)(10). Such a motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *St Paul Fire and Marine Ins Co v Quintana*, 165 Mich App 719,722, *lv denied*, 430 Mich 885 (1988). The moving party must specifically identify the issues as to which there is no genuine issue as for any material fact, and must support the motion with admissible evidence.

The adverse party must respond with affidavits, setting forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). The non-moving party may not rest upon mere allegations or denials, but must proffer evidence of specific facts showing that there is a genuine issue for trial.

Veenstra v Washtenaw Country Club, 446 Mich 155 (2002). Mere speculation, or a promise to offer factual support for a claim at trial, is insufficient to establish a genuine issue of material fact precluding a summary disposition. *Hall v Consolidated Rail Corp,* 462 Mich 179 (2000).

If the pleadings and/or proofs show that there is no genuine issue of material fact, the court shall render judgment without delay. MCR 2.116(I)(1). If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2). As the party opposing the motion, plaintiff is entitled to the benefit of reasonable doubt. *Wolfe v Employer's Health Ins Co,* 194 Mich App 172 (1992).

B. RLUIPA claim

1. *Applicable law as to "substantial burden"*

The Court of Appeals remanded the present case for this Court to determine, *inter alia,* whether plaintiff has suffered a substantial burden on its religious exercise for RLUIPA purposes. The Court of Appeals stated that such a determination required a focus on factors and considerations that were not addressed by either party, including:

(1) whether there are alternate locations in the area that would allow the school consistent with the zoning laws;

(2) the actual availability of alternate property, either by sale or lease, in the area;

(3) the availability of property that would he suitable for a K-3 school;

(4) the proximity of the homes of parents who would send their children to the school; and

(5) the economic burdens of alternate locations.[2]

After listing these factors, the Court of Appeals stated that because neither party had submitted documentary evidence on these factors, it was unable to determine conclusively whether plaintiff had established a *prima facie* case under the RLUIPA.

In addition to the above specific factors, the Court of Appeals, citing various cases, enumerated well established principles as to what constitutes a "substantial burden" on religious exercise.

> For a governmental regulation to substantially burden religious activity, it must have a tendency to coerce individuals into acting contrary to their religious beliefs. *Lyng v Northwest Indian Cemetery Protective Ass'n*, 485 US 439, 450-51; 108 S Ct 1319; 99 L Ed 2d 534 (1988).
>
> A government regulation does not substantially burden religious activity when it only has an

---

[2] These five factors, at least in the present case, overlap extensively. They boil down simply to the question whether there is any (other) property in the area that could be used for a school, is zoned to allow a school and is within plaintiff's budget (to buy, build and/or modify). Is there another property plaintiff could use that plaintiff could afford?

incidental effect that makes it more difficult to practice the religion. *Thiry v Carlson,* 78 F3d 1491, 1495 (CA 10, 1996).

For a burden on religion to be substantial, the government regulation must compel action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution or adherent is insufficient. *Werner v McCotter*, 49 F3d 1476, 1480 (CA 10, 1995).

The regulations must have a "chilling effect" on the exercise of religion to substantially burden religious exercise in order to be consistent with the Supreme Court's substantial burden test. *Cottonwood Christian Center v Cypress Redevelopment Agency*, 218 F Supp 2d 1203, 1226 (CD Cal, 2002).

As stated by the Circuit Court of Appeals for the Ninth Circuit in *Grace Methodist Church v City of Cheyenne*, 427 F3d 775,794-95 (CA 9, 2005), RLUIPA's legislative history indicates that "substantial burden" is to be interpreted by reference to the Religious Freedom Restoration Act of 1993 (RFRA), 42 USC 2000bb *et seq*, and First Amendment jurisprudence. The term "substantial burden" is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or *[sic]* religious exercise. *Id,* quoting 146 Cong Rec 7774-01, 7776. To be a "substantial burden," a land use regulation must place more than an inconvenience on religious exercise. Instead, a "substantial burden" is analogous to a significant pressure directly coercing the religious adherent to abstain from religious precepts or pressures

conformity. *Midrash Sephardi, Inc v Town of Surfside*, 366 F3d 1214, 1227 (CA 11, 2004), *cert denied*, 543 US 1146; 125 S Ct 1295; 161 L Ed 2d 106 (2005).

Some courts have rejected claims under the RLUIPA where the "substantial burden" complained of consisted of market factors (high cost of property) and inconvenience. In *Civil Liberties for Urban Believers v City of Chicago*, 342 F3d 752 (C.A 7, 2003) ("*CLUB*"), for example, an association of about 40 to 50 and five individual churches filed suit against the city of Chicago, challenging an ordinance that required them to obtain special use approval to operate in commercial and business areas, and limiting their operation in manufacturing areas. They argued, among other things, that the ordinance violated the RLUIPA in that it imposed a substantial burden on religious exercise.

The Seventh Circuit first addressed how to determine whether a land use regulation constitutes a substantial burden under RLUIPA, which provides a broader definition for "religious exercise" than did RFRA. It held that a land-use regulation imposes a substantial burden on religious exercise when it "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise – including the use of real property for the purpose thereof within the regulated jurisdiction generally – effectively impracticable." 342 F2d at 761.

The Seventh Circuit then addressed the plaintiff churches' argument that being required to obtain special use permits, obtain approval of planned developments or purchase property in residential zoning districts (where churches were a permitted use)

constituted a substantial burden. It stated (342 F2d at 761-62):

> Appellants contend that the scarcity of affordable land available for development in R zones, along with the costs, procedural requirements, and inherent political aspects of the Special Use, Map Amendment, and Planned Development approval processes, impose precisely such a substantial burden. However, we find that these conditions – which are incidental to any high-density urban land use – do not amount to a substantial burden on religious exercise. While they may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, they do not render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago. *See, eg, Love Church v City of Evanston*, 896 F2d 1082, 1086 (CA 7, 1990) ("Whatever specific difficulties [plaintiff church] claims to have encountered, they are the same ones that face all [land users]. The harsh reality of the market place sometimes dictates that certain facilities are not available to those who desire them"). Significantly, each of the five individual plaintiff churches has successfully located within Chicago's city limits. That they expended considerable time and money so to do does not entitle them to relief under RLUIPA's substantial burden provision. *See, eg, Stuart Circle Parish v Board of Zoning Appeals of Richmond*, 946 F Supp 1225, 1237 (ED Va 1996) ("It is well established that there is no

> substantial burden placed on an individual's free exercise of religion where a law or policy merely 'operates so as to make the practice of [the individual's] religious beliefs more expensive.'") (quoting *Braunfeld v Brown* 366 US 599, 605; 81 S Ct 1144; 6 L Ed 2d 563 (1961) (plurality opinion)). Otherwise, compliance with RLUIPA would require municipal governments not merely to treat religious uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright exemption from land-use regulations. Unfortunately for Appellants, no such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise.

Other courts have taken the view that the high cost of real estate and/or inconveniences or costs associated with obtaining property on which to conduct religious exercise do not suffice to establish a substantial burden under the RLUIPA. See *San Jose Christian College v City of Morgan Hill*, 360 F3d 1024 (CA 9, 2004), *Midrash Sephardi, Inc v Town of Surfside*, 366 F3d 1214 (CA 11, 2004), *Williams Island Synagogue, Inc v City of Aventura*, 358 F Supp 2d 1207, 1215 (SD Fla 2005), *Vineyard Christian Fellowship of Evanston, Inc v City of Evanston*, 250 F Supp 2d 961 (ND Ill 2003), *Episcopal Student Foundation v City of Ann Arbor*, 341 F Supp 2d 691 (ED Mich, 2004), *St Joseph's Korean Catholic Church v Zoning Bd of Adjustment of the Borough of Rockleigh* unpublished opinion *per curiam* of the Superior Court of NJ, Appellate Div, decided 5/16/2006 (Docket No. BER-L-4370-03); 2006 WL 1320089 (NJ Super AD 2006), and see *Westchester Day School v Village of Mamaroneck*, 386 F3d 183

(CA2 2004) (reversing trial court's order granting summary judgment for plaintiff).

In *Greater Bible Way Temple of Jackson v City of Jackson*, 268 Mich App 673 (2005), *lv app granted*, 474 Mich 1133 (2006), the Michigan Court of Appeals reached a different conclusion. The plaintiff church in *Greater Bible Way* bought eight nearby parcels of land to construct an assisted living center for elderly and disabled people. It then applied for rezoning of the parcels, from single family residential to multiple family residential, so it could build the center as an apartment complex. The trial court found that the city's denial of the church's application violated the RLUIPA, and the city appealed.

Considering whether the city's denial of the rezoning request constituted a substantial burden on the plaintiff's religious exercise, the Court of Appeals stated, 268 Mich App at 681-82:

> As discussed above, providing housing and services to the community is not only part of plaintiff's mission as a church but is central to its religious faith. Combs's affidavit explains that plaintiff cannot afford to purchase different property and that it would lose an investment of over $150,000 if it cannot provide housing on the property in question. Moreover, because of services the church provides to the elderly, it is necessary for the apartment complex to be close to the church; thus, moving the project to another site would impose a substantial burden on plaintiff. The evidence additionally indicated that building single-family homes would not be

economically feasible as an alternative for plaintiff.

Also, both Combs's affidavit and the affidavit of Doug Volkman, a realtor, indicated that there were no properties for sale near the church that are zoned R-3. In light of these facts, defendants' denial of the petition for rezoning would create an economic burden, unless property were available in an R-3 zone. Because no such property was available near the church in an R-3 zone, it would be a substantial burden for plaintiff to forgo developing the project. The government's implementation of the ordinance would, in effect, compel inaction with respect to plaintiff"s sincerely held belief. *Shepherd Montessori, supra* at 330, 675 NW2d 271....Although there were differing opinions concerning the value of the subject property and the amount invested in the property, there was no dispute that the value of the property and plaintiff's investment are substantial. Moreover, there was no dispute that available property zoned R-3 near the church does not exist. Accordingly, the trial court did not err in its ruling with respect to the substantial burden issue.

The Seventh Circuit revisited the issue of "substantial burden" in *Sts Constantine and Helen Greek Orthodox Church, Inc v City of New Berlin*, 396 F3d 895 (CA 7, 2005). The plaintiff church had purchased a 40 acre tract of land over a period of years because it needed to replace its existing church, which its congregation was outgrowing. The property the church bought was bordered on one side by a

protestant church; and on the other side by a parcel, owned by another protestant church, that the city had agreed to rezone to allow a church to be built on it. The plaintiff church, after acquiring the land, requested rezoning of 14 of the 40 acres from residential to institutional to allow the new church to be built.

When considering the plaintiff's application for rezoning, the city expressed concern that should the parcel be rezoned for institutional use a school or other nonreligious facility might be built on it. The plaintiff therefore modified its application by adding a proposal that the city promulgate a "planned unit development overlay" ordinance that would limit the parcel to church-related uses. Although the city's planning director recommended approval of the revised proposal, the city council denied the application and the church brought suit under the RLUIPA.

The church sought relief, *inter alia*, under the RLUIPA, arguing that the denial of its application constituted a substantial burden on the exercise of its religion. On the plaintiff's appeal from summary judgment, the Seventh Circuit observed that for the "substantial burden" provision of the RLUIPA, 42 USC 2000cc(a)(1), not to be redundant of the "non-equal treatment" provision, 42 USC 2000cc(b)(1,2),[3] it must mean something more than merely not imposing more of a burden on a religious entity than on a nonreligious one (characterizing the city's position as being "that

---

[3] This provision forbids a government to impose a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

the Church can't complain about being treated badly so long as it is treated no worse than other applicants for zoning variances," *id* at 900). It stated that, regardless of how the municipality treats nonreligious entities, if a land-use decision imposes a substantial burden on religious exercise and the decision maker cannot justify it, the inference arises that hostility to religion or a particular sect influenced the decision. *Id.* It concluded, 396 F3d at 901:

> The burden here was substantial. The Church could have searched around for other parcels of land (though a lot more effort would have been involved in such a search than, as the City would have it, calling up some real estate agents), or it could have continued filing applications with the City, but in either case there would have been delay, uncertainty, and expense. That the burden would not be insuperable would not make it insubstantial. The plaintiff in the *Sherbert* case, whose religion forbade her to work on Saturdays, could have found a job that didn't require her to work then had she kept looking rather than giving up after her third application for Saturday-less work was turned down. But the Supreme Court held that the fact that a longer search would probably have turned up something didn't make the denial of unemployment benefits to her an insubstantial burden on the exercise of her religion. [Citations omitted.]

2. *The burden on Shepherd Montessori's religious exercise*

Plaintiff discusses in detail each factor suggested by the Court of Appeals as relevant and the evidence relating to that factor. Taken as a whole, however, plaintiff makes essentially two arguments. First, all the (voluminous) documentary evidence, and the testimony of its witnesses, prove that there is no property available on which to establish the proposed K-3 primary school that is affordable, either with or without remediation (such as engineering solutions to physical problems with land or existing structures, or building a new building). Second, defendants have undertaken no investigation and have offered no documentary evidence concerning the cost and/or availability of alternate properties. In plaintiff"s view, its proffered evidence and the lack of contradictory evidence from defendants are dispositive of the issue whether defendants' action constitutes a substantial burden on plaintiff's free exercise of religion.

Defendants discuss the Court of Appeals' factors and the evidence submitted by plaintiff, but, unlike plaintiff, rely on cases in addition to the Court of Appeals' opinion in this case. Defendants point out that market factors and inconvenience are not sufficient to constitute a substantial burden under the RLUIPA, citing *Civil Liberties for Urban Believers v City of Chicago, supra,* and several other cases from other jurisdictions. Defendants liken plaintiff's circumstances in the present case to those of the plaintiff churches, arguing that the scarcity of affordable land in a city and costs associated with obtaining special use permits are incidental to any high-density urban land use. *CLUB* at 761-62.

1. *"whether there are alternate locations in the area that would allow the school consistent with the zoning laws"*

There are fourteen different zoning districts within Ann Arbor Township alone in which primary schools are a permitted use. There are, in fact, at least eighteen private elementary schools within fifteen miles of Ann Arbor and ten Montessori schools, of which six offer classes up to grade 5 and beyond. The record establishes that there are myriad alternate locations in the area in which schools such as that which plaintiff wishes to open are permitted.

2. *"the actual availability of alternate property, either by sale or lease, in the area"*

There are many properties available at any given moment in time that are available by sale or lease. Plaintiff looked at only 24 properties over approximately six years (assuming the last search was in 2002, the date of the most recent documents included in plaintiffs exhibits), which does not seem to be a particularly intensive search, belying the assertion that the inability to use the Rainbow Rascals space substantially burdened plaintiff's religious exercise.

Plaintiff gives as the reason it was not able to purchase seven of the properties that they were not for sale. That plaintiff chose to make offers for several properties that were not for sale does not mean there were none – it merely demonstrates that plaintiff was overly optimistic about its ability to persuade owners to sell properties they did not want to sell. Furthermore, it appears that the only *leases* plaintiff

considered were leases from its supporting entities, Ave Maria and its related companies.

Finally, as defendants point out, as of 2002 the Shepherd Montessori Milan space already housed exactly what plaintiff planned to create: a Shepherd Montessori primary school. There is no evidence that the Shepherd Montessori Milan was overcrowded, and it apparently functioned perfectly well for several years even though it was not located in Ann Arbor Township.

Plaintiff has not demonstrated that other properties are not available by sale or lease. Defendants, on the contrary, have demonstrated that there are.

3 *"the availability of property that would be suitable for a K-3 school"*

Plaintiff's current location – in the Office Park – is not essential to its religious exercise, as Ms. Corera freely admits. It is apparent from Ms, Corera's testimony that she simply had her heart set on staying in the Office Park because of her personal preferences and for the sake of convenience.

> Q. If another location in the area were available at either a purchase rate or a rental rate that approximated $40,000 a year, would that be a place you would move to?
>
> A. I would, again, consider it according to my budget.

Q. But again, the supposition is if it's the same basic rental or purchase price, if it were a mortgage close to what you are paying now for your current rent expense –

A. Correct.

Q. – and it were available, is there anything that would stop you from utilizing that space?

A. Well there [are] many things personally, again, I am saying. I am a teacher here and I have might have taught in other buildings, especially like the one in Milan stuck along the woods there. This has so many advantages for my students that I just love this building. First, we have the chapel and the mass and all those religious activities and the art gallery. And when it's raining, you have to go to gym, it's all pandemonium; her it's so nice. You can't go out, but you don't have to stay in the classroom. You can go around to the art gallery, and we go on different field trips right in the building, walking field trips, and it's all those things that I think are wonderful. Our children learn how to greet people. They know to open the door when they see a mom carrying a baby. All these things, after having taught so many years, I didn't see it happening in other buildings.

Q. But aren't these really more a matter of your convenience or preference, there is not a reason that you couldn't operate in another location?

A. Correct.

Several properties rejected by plaintiff could have been made suitable for a K-3 school. Indeed, given enough financial resources, almost any property located in an area that permits such schools could be modified – whether by construction, remodeling, re-engineering – and made suitable for a K-3 school.[4]

The documents plaintiff has attached as its Exhibit 14 indicate that it has offered or contemplated offering, as much as $880,000 (after leasing the property for three to five years) to the Knights of Columbus, with the provision that if a Catholic school was built on the property, the Knights would contribute $400,000 to build the school and $100,000 to endow a scholarship. Plaintiff offered prices for various properties prices ranging from $125,000 to $550,000, with most offers around $300,000. It is not clear what the actual budgetary constraints and considerations were for plaintiff – whether factors other than the price and appropriateness for a K-3 school weighed in the decision whether to buy each particular property – but clearly a property could have been purchased and adapted with the financial resources available to plaintiff[6]

---

[4] Almost any property can be *made* suitable if enough money is invested in, for example, demolishing an old, unusable building and constructing a new building; remodeling an existing building; engineering a septic field or connecting to a public sewer; or fencing off a stream that runs through it (or other potentially dangerous landscape feature). Thus, whether a particular property would be suitable for a K-3 school overlaps almost completely with the consideration whether a particular property is within the plaintiff's financial means.

[5] Normally, the existence of well-funded corporate entities owned by the principal(s) of the plaintiff organization would not be

4. "*the proximity of the homes of parents who would send their children to the school*"

Only one of Shepherd Montessori Ann Arbor's students had a parent or parents working in the Domino's Farms Office Park. Plaintiff drew students from all over the Ann Arbor area and was itself willing to consider locations in Milan, Saline, Ypsilanti and Chelsea. Only one property – the property located north of Chelsea – was rejected because it was not easily accessible; none was rejected because it was too far away.

5. "*the economic burdens of alternate locations*"

Despite plaintiffs assertions that many of the properties it considered were too expensive for Shepherd Montessori, plaintiff has not established this. For several of the properties described as "too expensive," plaintiff simply does not provide the asking price or an explanation of its finances relative to the property purchase. Regarding many, if not most, of the properties plaintiff considered, Mr. Leipold's affidavit simply states in vague and conclusory fashion

---

relevant to whether the plaintiff has the financial resources to accomplish its goal. In the present case, however, Ms. Corera testified, and it is apparent from a review of the documents plaintiff has submitted, that Shepherd Montessori supported itself to the best of its ability but that the Ave Maria Foundation provided whatever other funds were necessary to operate the school; and that the Ave Maria Foundation, whether through the Muirfield corporation or directly, made its extensive resources available to buy property ostensibly for Shepherd Montessori. In light of this evidence, it is appropriate to weigh the Ave Maria Foundation's contributions as part of Shepherd Montessori's financial resources.

that they were too expensive for plaintiff or "not appropriate."

Courts have held with good reason that inconvenience and/or the high cost of real property in a particular area should not suffice to establish a substantial burden. No buyer ever finds a truly *perfect* property, and it will always be relatively easy for a plaintiff, such as Shepherd Montessori, to articulate *some* ostensibly logical reason for rejecting any but the property in dispute. Plaintiff can list hundreds of properties that are undesirable or unavailable without having to make any real effort to find one – again, other than the subject property – that could meet its needs and its budget.

In this Court's view, plaintiff has failed to establish that the Township's denial of its application for a special use permit has substantially burdened the exercise of plaintiff's religion. Plaintiff essentially wishes to have the Township relieve it of the "harsh realities of the marketplace," and allow it to take advantage of the lower rent its affiliated entities would be willing to charge *for that particular space*. That plaintiff's affiliated entities are willing to charge plaintiff lower rent for space in the Office Park, yet are not willing to charge plaintiff lower rent for the Via Sacra space, is not a problem of the Township's making.

Other Montessori schools seem to make to find appropriate space and sufficient budgets to operate them, including paying rent or mortgages. For some reason, Shepherd Montessori has trouble with this, but its administrative situation and self-imposed

restraints on how much tuition it is willing to charge are also not the Township's problem.

There is no dearth of available properties in Ann Arbor and the surrounding areas. The Township is not charged with the responsibility of ensuring that any piece of property plaintiff decides is perfect for it be (re)zoned so that plaintiff can use it for a school.

The present case is distinguishable from *Greater Bible Way Temple of Jackson v City of Jackson.* In *Greater Bible Way,* it was essential for the plaintiff church's religious practice to provide housing for the elderly and disabled, and it could do that only in an extremely limited area – adjacent or in very close proximity to the church itself. The nature of the services to the elderly and disabled, and the church's financial resources, did not permit the use of single family housing that would have been permitted in the zoning district.

In the present case, the exact location of the plaintiff school is not critical to plaintiff's religious exercise. Plaintiff has admitted that it could operate its primary school in any number of locations. Clearly, it is the convenience that makes the Rainbow Rascals space so desirable to plaintiff. That particular space is not essential to plaintiff's mission. As stated by the New Jersey appellate court in *St Joseph's Korean Church, supra,* at *7,

> any difficulties plaintiff may have in finding an alternate location in Rockleigh for its house of worship is a product of the marketplace and the geographic area in question. . . . [T]he scarcity of affordable land available for development

> does not impose a substantial burden on religion. . . . We additionally reject the importance plaintiff places in its allegation that it took four and a half years to find the subject property. The length and difficulty of that search does not transform the board's enforcement of its land use regulations into a constitutional deprivation or a violation of the RLUIPA.

Based on the completed factual record as presented by the parties, plaintiff's motion for summary disposition of its claim under the RLUIPA is denied. Defendants' motion for summary disposition of plaintiff's RLUIPA claim is granted.

C. Equal protection claim

The Court of Appeals remanded plaintiff's equal protection claim to this Court, stating that, on the record as developed prior to summary disposition, reasonable minds could differ as to whether plaintiff and Rainbow Rascals were similarly situated yet received different treatment from the Township. The Court of Appeals also noted plaintiff's argument that the question put by ZBA member Laporte to Ms. Corera at the ZBA hearing, whether Ms. Corera believed that she had some additional right to the relief that she would not have as a non-religious entity, could constitute evidence of discriminatory animus, but it did not hold that Laporte's statements alone would be sufficient to create a genuine issue of material fact in dispute as to discriminatory animus.

Now that discovery has been completed and defendant has filed a motion for summary disposition

of plaintiff's equal protection claim, the burden is on plaintiff to offer evidence of either intentional discrimination or disparate treatment from which discriminatory animus could be inferred.[6]

The only direct evidence of discrimination plaintiff offers is Ms. Laporte's question to Ms. Corera at the ZBA hearing as to whether Ms. Corera believed that Shepherd Montessori had rights over and above those afforded to non-religious entities with regard to land use issues. Although this evidence was sufficient, the Court of Appeals held, to survive summary disposition before the close of discovery – before plaintiff had an opportunity to perform a more thorough factual investigation – Ms. Laporte's remarks at the ZBA hearing, without more, simply do not create a disputed issue of fact as to whether the variance was denied based on religious discrimination. Ms. Corera stated, during her deposition, that she did not have a personal experience of having seen or heard something that would support a conclusion that there was a religious (or anti-religious) motivation for denying plaintiff's request.

Nor has plaintiff produced evidence that it was treated differently from a non-religious entity. True, Rainbow Rascals did receive a variance – but the variance had nothing to do with the number of students or level of education. Rainbow Rascals received a variance to allow children other than children of Domino's Farms Office Park employees to use Rainbow Rascals day care – the exact same

---

[6] There seems to be no dispute that the challenged zoning ordinance is constitutional on its face.

variance that Shepherd Montessori itself received from the Township.

Plaintiff's observation that the Townshp failed to make specific findings that plaintiff's use of the Rainbow Rascals space would cause problems with respect to traffic, safety, sewage capacity, etc., wouid be of more moment if plaintiff could point to any non-religious entity regarding whose application these concerns were addressed, or not addressed and the application granted. As defendant argues, the burden was on plaintiff to show no other reasonable conforming use of the space was possible before the ZBA was required to make such findings.

In response to plaintiff's motion for summary disposition on this claim and in support of its own, defendant points out that it has approved several Catholic schools in the past, including Spiritus Sanctus (built adjacent to the Office Park), St. Michael's Academy and Gabriel Richard High School. Other members of plaintiff's class have been treated favorably by defendant; there is no evidence that a similarly situated non-class member was treated more favorably than was plaintiff. Plaintiff's motion for summary disposition of its equal protection claim is denied. Defendant's motion for summary disposition of this claim is granted.

D. Claim of appeal from ZBA decision

The Court of Appeals remanded this claim for this Court to determine, depending on the ultimate resolution of plaintiff's RLUIPA and equal protection claims. Because plaintiff cannot offer sufficient evidence to establish a violation of the RLUIPA or

equal protection clause, the ZBA's decision was not contrary to law. The decision of the ZBA is affirmed.

IV. CONCLUSION

For the reasons stated above, plaintiff Shepherd Montessori's motion for summary disposition is denied. Defendants' motion for summary disposition is granted, and plaintiffs RLUIPA, equal protection and appeal claims are dismissed.

/s/ Melinda Morris
Melinda Morris
Circuit Court Judge

* * *

[*Proof of Service Omitted from Printing of this Appendix*]

APPENDIX I

STATE OF MICHIGAN
SUPREME COURT

No. 125267
COA No. 233484

[Filed September 16, 2004]

SHEPHERD MONTESSORI CENTER MILAN, a Michigan not for profit corporation,	)
Plaintiff-Appellee,	)
v	)
ANN ARBOR CHARTER TOWNSHIP, ANN ARBOR CHARTER TOWNSHIP ZONING OFFICIAL, and ANN ARBOR CHARTER TOWNSHIP ZONING BOARD OF APPEALS,	)
Defendants-Appellants.	)

Disposition: On the order of the Court, the application for leave to appeal the November 6, 2003 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should not be reviewed by this

Court. The motion to file brief amicus curiae is DENIED as moot.

APPENDIX J

STATE OF MICHIGAN
COURT OF APPEALS

FOR PUBLICATION
November 6, 2003
9:05 a.m.

No. 233484
No. 234300
Washtenaw Circuit Court
LC No. 00-001072-AS

Updated Copy
January 16, 2004

SHEPHERD MONTESSORI CENTER MILAN,

Plaintiff-Appellant,

v

ANN ARBOR CHARTER TOWNSHIP, ANN ARBOR CHARTER TOWNSHIP ZONING OFFICIAL, and ANN ARBOR CHARTER TOWNSHIP ZONING BOARD OF APPEALS,

Defendants-Appellees.

Before: Murphy, P.J., and Owens and Schuette, JJ.

SCHUETTE, J.

Plaintiff appeals as of right an order granting defendants' motion for summary disposition, denying plaintiff's motion for summary disposition, and denying plaintiff's request for a preliminary injunction. We affirm in part, reverse in part, and remand to the trial court for further proceedings consistent with this opinion.

I. ISSUE SUMMARY

This case involves the protections provided by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 USC 2000cc, and the fundamental guarantee of equal protection as provided by the United States Constitution. The heart of the issue concerns plaintiff's desire to operate a religious primary school for children, kindergarten through third grade, in an area zoned as an office park and defendants' refusal to permit this type of use. Plaintiff filed suit after township officials determined that plaintiff's intended use of the premises—the operation of a faith-based primary school—was prohibited by the local zoning ordinance.

RLUIPA prohibits a governmental entity from imposing on a person, or on a religious institution or assembly, a land use regulation that substantially burdens the free exercise of religion. RLUIPA also provides protection to individuals in prisons or mental hospitals in their free exercise of religion, which is not at issue in this case.

Under RLUIPA, plaintiff must fulfill two separate tests to receive the protections offered by this statute.

First, plaintiff must establish one of three jurisdictional requirements specified in RLUIPA. The trial court held that plaintiff failed to meet any of the jurisdictional requirements and, therefore, the first test of RLUIPA was not met. We disagree. When the Ann Arbor Charter Township Zoning Board of Appeals examined and subsequently denied plaintiff's petition for a variance, an individualized assessment pursuant to 42 USC 2000cc(a)(2)(C) occurred. Therefore, plaintiff did meet one of the three jurisdictional requirements specified by Congress under RLUIPA.

Second, after meeting the jurisdictional requirements, plaintiff must also satisfy the substantial burden on religious exercise test set forth in RLUIPA. In other words, plaintiff must establish a prima facie case to invoke the statutory protections contained in RLUIPA. Plaintiff and defendants each filed motions for summary disposition on plaintiff's RLUIPA claim. We hold that there are genuine issues of material fact regarding whether plaintiff has established a prima facie case pursuant to RLUIPA. Therefore, while the trial court's denial of plaintiff's motion was correct, the trial court's granting of defendants' motion was premature and in error.

The trial court also granted defendants' motion for summary disposition on plaintiff's claim that defendants' application of the zoning ordinance violated the equal protection guarantee of the United States Constitution. Again, the trial court erred. Genuine issues of material fact remain with respect to this issue, particularly with regard to whether plaintiff and Rainbow Rascals are similarly situated entities. The trial court ruled that plaintiff failed to establish an equal protection claim and, as a result, the burden

shifting analysis (i.e., strict scrutiny analysis) required in an equal protection analysis did not occur.

II. FACTS

This case originated from a zoning dispute in Ann Arbor Charter Township. Plaintiff had a leasehold interest in the Domino's Farms Office Park and operated a Catholic Montessori day care program. In April 2000, plaintiff notified the township of its intention to lease additional property immediately adjacent to its day care facility and to operate a Catholic Montessori school for children grades K-3. Plaintiff anticipated that twenty-five students would be attending this school. Plaintiff hoped to utilize space that had been occupied by the "Rainbow Rascals," (a non-religious, pre-school day care program), which previously had received approval from the defendants to accommodate up to one hundred students.

The property at issue is zoned "OP" (office park district) pursuant to the township zoning ordinance. The township zoning ordinance expressly permitted the operation of day care centers within the OP district, but only for children of office park employees. Plaintiff requested in writing a zoning determination from the township regarding whether plaintiff's proposed use of the property would be allowed under the township's ordinance. In a letter dated May 1, 2000, the zoning official for the township informed plaintiff that the zoning ordinance classified its proposed use as "primary school." The letter informed plaintiff that primary schools were not listed as permitted uses in OP districts and denied plaintiff's proposed use of the property.

On May 30, 2000, plaintiff filed a petition with the Ann Arbor Charter Township Zoning Board of Appeals (ZBA) appealing the zoning official's decision. Plaintiff sought the following: (1) a reversal of the zoning official's determination so as to allow the proposed use; (2) a use variance; and (3) a determination that plaintiff's proposed use as a primary school be considered a "substituted use" of the Rainbow Rascals day care program. With respect to plaintiff's second request in the May 30 petition, plaintiff noted that defendants had granted a use variance to Rainbow Rascals on December 3, 1991, which permitted an expanded use of the premises to allow children of non-office park employees to attend the Rainbow Rascals day care program. As mentioned, the original zoning ordinance allowed the operation of a day care facility in an area zoned OP only for use by children of office park employees. With respect to plaintiff's third request in its May 30 petition, plaintiff argued that its primary school should be considered a substitution of the day care program. Plaintiff noted that the proposed use of the property would be low impact and would involve less density than the currently approved use. Plaintiff emphasized that its proposed use would be for twenty-five students.

A hearing on plaintiff's petition was held on June 26, 2000. The ZBA rejected plaintiff's appeal. The ZBA held that plaintiff's proposed use of the property for a primary school could not be considered a substitution of a non-conforming use. The ZBA determined that because Rainbow Rascals had received a variance, its use of the premises became a conforming and permitted use in the OP district. Therefore, plaintiff's use would be non-conforming and a substitution was not permitted. The ZBA then determined that a

primary school was not a permitted use in an area zoned OP. Finally, the ZBA denied plaintiff's request for a use variance because plaintiff failed to make the requisite showing that without the variance, there could be no viable economic use of the property.

On September 22, 2000, plaintiff filed the instant lawsuit. The complaint alleged: violations of RLUIPA; violations of substantive due process, procedural due process, and equal protection; that the township's zoning ordinance was void for vagueness; that plaintiff was entitled to an order of superintending control; a statutory appeal as of right from the decision of the ZBA; and that defendants' actions and zoning ordinance were unreasonable. Subsequently, both parties filed motions for summary disposition. Plaintiff also filed a motion requesting a preliminary injunction.

On January 16, 2001, the trial court granted defendants' motion for summary disposition, denied plaintiff's motions for summary disposition, and denied plaintiff's request for a preliminary injunction. The trial court ruled that plaintiff had not met any of the jurisdictional elements required to invoke the protections of RLUIPA. The court also determined that plaintiff failed to establish a prima facie case under RLUIPA because plaintiff failed to establish that the application of the zoning regulation substantially burdened plaintiff's right of free exercise of religion as required under RLUIPA. The court affirmed the ZBA's decision and determined that no genuine issue of material fact existed with regard to plaintiff's substantive due process, equal protection, procedural due process, and void for vagueness claims. It also denied plaintiff's petition for superintending control

and motion for preliminary injunction. Plaintiff appeals as of right.

III. STANDARD OF REVIEW

On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek, supra* at 337. The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law. *American Community Mutual Ins Co v Comm'r of Ins*, 195 Mich App 351, 362; 491 NW2d 597 (1992).

When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b); *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). All reasonable inferences are to be drawn in favor of the nonmovant. *Hall v McRea Corp*, 238 Mich App 361, 369-370; 605 NW2d 354 (1999).

IV. RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000 (RLUIPA)

A. Origins of RLUIPA: *City of Boerne v Flores*[1] and RFRA

The roots of RLUIPA can be traced to the Religious Freedom Restoration Act (RFRA), a federal law enacted in 1993, and to the United States Supreme Court decision in *City of Boerne v Flores*, 521 US 507; 117 S Ct 2157; 138 L Ed 2d 624 (1997). In *Flores*, the United States Supreme Court ruled that certain provisions of RFRA violated the United States Constitution. Congress responded to the Supreme Court's decision in *Flores* by enacting RLUIPA, which addressed both the admonitions and constitutional concerns expressed by the Supreme Court in the *Flores* decision.[2]

The stated purpose in RLUIPA is to "remedy the well documented discriminatory and abusive treatment suffered by religious individuals and organizations in the land use context." 146 Cong Rec E 1234, 1235 (July 14, 2000). RLUIPA attained this goal by imposing the strict scrutiny standard of review on

---

[1] *City of Boerne v Flores*, 521 US 507; 117 S Ct 2157; 138 L Ed 2d 624 (1997).

[2] Defendants to not challenge the constitutionality of RLUIPA, and we do not address its constitutionality. However, we note that in the recent case of *Elsinore Christian Center v City of Lake Elsinore*, 270 F Supp 2d 1163 (CD Cal, 2003), the court ruled that RLUIPA was unconstitutional. This decision is not binding on this Court.

the government if a claimant demonstrates that the government substantially burdened the claimant's free exercise of religion. 146 Cong Rec S 7774 (July 27, 2000).

In the land use context, Congress made several findings that shed some light on the present matter. Senators Hatch and Kennedy co-sponsored RLUIPA; they stated:

> This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination and unfair delay.
>
> * * *
>
> . . . In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing these facilities may be owned, sponsored or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within the bill's definition or [sic] religious exercise. [146 Cong Rec S 7774, 7776 (July 27, 2000).]

The legislative history of RLUIPA states that it "is only the use, building, or conversion for religious

purposes that is protected, and not other uses or portions of the same property." 146 Cong Rec E 1563, 1564 (September 22, 2000). For example:

> [I]f a commercial enterprise builds a chapel in one wing of the building, the chapel is protected if the owner is sincere about its religious purposes, but the commercial enterprise is not protected. Similarly, if religious services are conducted once a week in a building otherwise devoted to secular commerce, the religious services may be protected but the secular commerce is not. [*Id.*]

B. RLUIPA's Jurisdictional Elements

Plaintiff argues that the trial court erred in granting defendants' motion for summary disposition and dismissing plaintiff's claim under RLUIPA. In order to establish a claim under RLUIPA, a party must establish that at least one of these three jurisdictional elements exists:

> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
>
> (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

> (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved. [42 USC 2000cc(a)(2).]

Plaintiff asserts that it has met two of the three jurisdictional requirements: interstate commerce pursuant to 42 USC 2000cc(a)(2)(B) and an individualized assessment of plaintiff's proposed use of the property pursuant to 42 USC 2000cc(a)(2)(C). We agree that defendants made an individualized assessment of plaintiff's proposed use of the property.

Defendants' conduct constituted an individualized assessment when the ZBA: (1) affirmed the zoning administrator's decision that a primary school was not a permitted use in the OP district; (2) denied plaintiff's application for a use variance; and (3) denied plaintiff's request for a substituted, nonconforming use.

Here, the language of the zoning ordinance invites individualized assessments of the subject property and the use of such property, and contains mechanisms for individualized exceptions:

> The Board of Appeals shall have the power and duty to authorize in specific cases a relaxation of the provisions of this Ordinance through a variance as will not be contrary to public interest where, owing to special conditions, a literal enforcement of the provisions of this Ordinance would result in

> unnecessary hardship or practical difficulty. [Section 130.2411(A).]

The plain language of this ordinance allows for a "relaxation" of the provisions in certain cases. For example, a relaxation of the ordinance was granted to the previous tenant of the land in question, Rainbow Rascals. Although the provisions of the zoning ordinance allow for day care centers in an area zoned OP, those day care centers are specifically required by the ordinance to be designated for use only by the employees of the office park. Rainbow Rascals applied for, and received, a variance allowing children of non-office park employees to attend the non-religious day care program. Yet, the defendants refused to "relax" the ordinance for plaintiff's intended use as a religious school for young children. Defendants' conduct constituted an individualized assessment of the use of property by plaintiff contrary to RLUIPA. 42 USC 2000cc(a)(2)(C). Accordingly, the trial court erred in ruling that plaintiff failed to establish this jurisdictional element. In light of our ruling, we need not address the other two jurisdictional subsections of RLUIPA, 42 USC 2000cc(a)(2)(A), (B).[3]

---

[3] Judge Schuette, in his individual capacity, contends that the second jurisdictional element of RLUIPA, 42 USC 2000cc(a)(2)(B), was indeed met and that the trial court misapplied the ruling in *United States v Lopez*, 514 US 549; 115 S Ct 1624; 131 L Ed 2D 626 (1995). However, given the unanimity of opinion concerning the individualized assessment made by defendants pursuant to 42 USC 2000cc(a)(2)(C), the Court does not need to address the applicability of 42 USC 2000cc(a)(2)(B) to this case.

C. Substantial Burden on Religious Exercise Test

Once the jurisdictional requirements of RLUIPA have been satisfied, plaintiff must establish a "substantial burden on religious exercise." As a general rule, RLUIPA provides:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest. [42 USC 2000cc(a)(1).]

Challenges of zoning ordinances under RLUIPA are expressly contemplated. 42 USC 2000cc-5(5). The use of the land does not have to be a "core religious practice." Rather, "[t]he term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 USC 2000cc-5(7)(A). Further, RLUIPA explicitly states that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 USC 2000cc-5(7)(B). Here, we believe that plaintiff has sufficiently shown that the contemplated use for the subject property—a faith-based primary school—falls within this broad definition of a religious exercise.

The more difficult question is whether plaintiff introduced sufficient evidence to allow reasonable minds to differ with respect to whether defendants imposed a "substantial burden" on this religious exercise. The substantial burden must be based on a "sincerely held" religious belief. *Werner v McCotter*, 49 F3d 1476, 1479 n 1 (CA 10, 1995) (citing *Wisconsin v Yoder*, 406 US 205, 215-219; 92 S Ct 1526; 32 L Ed 2d 15 [1972]). In *Lyng v Northwest Indian Cemetery Protective Ass'n*, 485 US 439, 450-451; 108 S Ct 1319; 99 L Ed 2d 534 (1988), the Supreme Court indicated that for a governmental regulation to substantially burden religious activity, it must have a tendency to coerce individuals into acting contrary to their religious beliefs. *Id.* at 450-451. Conversely, a government regulation does not substantially burden religious activity when it only has an incidental effect that makes it more difficult to practice the religion. *Id.*; *Thiry v Carlson*, 78 F3d 1491, 1495 (CA 10, 1996). Thus, for a burden on religion to be substantial, the government regulation must compel action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution or adherent is insufficient. *Werner, supra* at 1480.

The difference between a "substantial burden" on religious exercise and an "inconvenience" on religious exercise has been discussed in federal court cases dealing with RLUIPA. The district courts have concluded that the regulations must have a "chilling effect" on the exercise of religion or substantially burden religious exercise in order to be consistent with the Supreme Court's substantial burden test. For example, in *Cottonwood Christian Ctr v Cypress Redevelopment Agency*, 218 F Supp 2d 1203, 1226-1227 (CD Cal, 2002), the federal district court held that the

denial of an application to build a church on its property constituted a substantial burden because "[p]reventing a church from building a worship site fundamentally inhibits its ability to practice its religion." *Id.* at 1226.

On appeal, plaintiff contends that it did, in fact, establish a prima facie case because it satisfied at least one of the jurisdictional elements and it presented facts demonstrating that defendant had placed a substantial burden on its religious exercise. Prima facie evidence is defined in Black's Law Dictionary (7th ed) as "evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced." RLUIPA indicates that a plaintiff will always have the burden of persuasion to prove a substantial burden on religious activity, and, once proven, the government must prove a compelling state interest using the least restrictive means. 42 USC 2000cc-2(b). In *Grace Untited Methodist Church v City of Cheyenne*, 235 F Supp 2d 1186, 1196 (D Wy, 2002), the federal district court, in a case involving an RLUIPA claim where the plaintiff church was not allowed to operate a religious day care facility, concluded that summary judgment was inappropriate because a genuine issue of material fact existed regarding whether Cheyenne's land use regulations substantially burdened Grace United's exercise of religion. The court stated that genuine issues of material fact existed regarding all the elements of the plaintiff's prima facie case under RLUIPA. *Id.*

In the present case, in order to determine whether plaintiff has, in fact, established a prima facie case, we must look at the documentary evidence presented to the trial court at the summary disposition hearing to

determine (a) whether plaintiff submitted sufficient, admissible, and uncontradicted evidence that established, as a matter of law, that there was a substantial burden on religious exercise such that plaintiff was entitled to summary disposition, and (b) whether defendants submitted sufficient, admissible, and uncontradicted evidence that established, as a matter of law, that there was not a substantial burden on religious exercise such that defendants were entitled to summary disposition. That being said, it is necessary to first address the parameters of what is relevant and constitutes a substantial burden on religious activity.

Viewing the evidence that was submitted in a light favorable to plaintiff, we first note that there is no claim by plaintiff that the location at issue has some religious significance such that plaintiff's faith requires a school at that particular site. But plaintiff asserted that it would not be feasible to operate a Montessori school at another location because of the burdens of having duplicate administration. In addition, it can be inferred from the record that moving both the day care center and the school to a different location would not be convenient to those parents who work in the adjacent office park. Thus, even if there is another location within the township that could house the proposed school, it is not clear that the school would necessarily be successful at this other location. Additionally, of course, if the school were not successful, then those parents desiring a religious education in the Montessori tradition for their children would, instead, be forced to send their children elsewhere for schooling.

We believe that the determination whether plaintiff has suffered a substantial burden on religious exercise requires us to focus on numerous factors and considerations that were not addressed by the parties. Those factors include: whether there are alternative locations in the area that would allow the school consistent with the zoning laws; the actual availability of alternative property, either by sale or lease, in the area; the availability of property that would be suitable for a K-3 school; the proximity of the homes of parents who would send their children to the school; and the economic burdens of alternative locations. These types of factors must be taken into consideration in determining whether there has been a substantial burden on religious activity. None of the parties submitted documentary evidence on these factors, and without evidence of these factors we were unable to conclusively determine that plaintiff has established a prima facie case. We conclude that the trial court erred in ruling that there was no material question of fact on the "substantial burden" issue.[4] Consequently, granting summary disposition for defendants was premature.[5]

---

[4] Judge Schuette, in his individual capacity, is particularly troubled by what he believes to be defendants' selective application of the zoning ordinance. He notes that the actions of the ZBA have effectively shut the schoolhouse door on plaintiff's desire to provide religious instruction to young children. He points out that the zoning board opened the door for Rainbow Rascals, a nonreligious entity, by granting a variance, yet denied plaintiff's request for a variance. In his view, the selective application of the ordinance has had a chilling effect on the free exercise and expression of plaintiff's faith.

[5] Having concluded that plaintiff's evidence was sufficient to render summary disposition premature, we reject plaintiff's

V. EQUAL PROTECTION

Plaintiff next argues that the trial court erred in granting defendants' motion for summary disposition on plaintiff's equal protection claim. We agree.

Equal protection of the law is guaranteed by both the federal and state constitutions. US Const, Am XIV, § 1; Const 1963, art 1, § 2; *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 716; 575 NW2d 68 (1997). These constitutional provisions are coextensive. *Id.* The doctrine mandates that persons in similar circumstances be treated similarly; furthermore, "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Yoder, supra* at 220.

The United States Supreme Court has established the following standards for determining the validity of state legislation such as zoning ordinances under the Equal Protection Clause: "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect classifications such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classifications challenged be rationally related to a legitimate state interest." *City of New Orleans v Dukes*, 427 US 297, 303; 96 S Ct 2513; 49 L Ed 2d 511 (1976).

---

contention that the trial court erred in denying its motion for summary disposition.

If the legislative classification negatively affects such a suspect class, then courts may uphold the classification only if it is precisely tailored to serve a compelling governmental interest. *Plyler v Doe*, 457 US 202, 216 n 14; 102 S Ct 2382; 72 L Ed 2d 786 (1982). Absent an invidious or gender-based classification, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne, Texas v Cleburne Living Center, Inc*, 473 US 432, 440; 105 S Ct 3249; 87 L Ed 2d 313 (1985). However, courts apply a strict scrutiny test in evaluating equal protection issues where a statute encroaches on a fundamental right, such as the right to free exercise of religion, as in the present case. *Sherbert v Verner*, 374 US 398, 407; 83 S Ct 1790; 10 L Ed 2d 965 (1963).

Under the strict scrutiny standard, the state must show that the statutory scheme in question was necessary to promote "a *compelling* state interest." *Shapiro v Thompson*, 394 US 618, 638; 89 S Ct 1322; 22 L Ed 2d 600 (1969) (emphasis in original). In addition, if the legislation affects fundamental rights, the Court has required the state to have chosen the least restrictive means of achieving the governmental objective. *Dunn v Blumstein*, 405 US 330, 343; 92 S Ct 995; 31 L Ed 2d 274 (1972).

In *Mount Elliott Cemetery Ass'n v City of Troy*, 171 F3d 398, 407 (CA 6, 1999), a zoning case involving an equal protection issue, the court upheld a grant of summary disposition for the defendant municipality because the plaintiff could not show that it was treated differently than others who were similarly situated

and that the selective treatment was based on the impermissible consideration of the plaintiff's religion.

On the other hand, in *Vineyard Christian Fellowship of Evanston, Inc v City of Evanston*, 250 F Supp 2d 961, 976 (ND IL, 2003), the court determined that the city of Evanston's claim that it had zoned purely for land use purposes, and not based on religion, was not supported by the facts. The court noted that it was persuaded to this viewpoint by the plaintiff's argument that the zoning ordinance would permit Vineyard's congregants to put on a production of the musical play "Fiddler on the Roof," which includes a scene depicting a traditional Jewish wedding at the property in question, but would not permit an actual religious wedding on that same property. *Id.* at 976. Similarly, in this case, Rainbow Rascals, a secular day care provider, received a variance that allowed it to accommodate children of non-office park employees. Nevertheless, defendants denied plaintiff's request to use the same property to accommodate the faith-based education of young children.

Here, the trial court required plaintiff to show that the selective treatment was based on an impermissible consideration such as religion. The trial court ruled that plaintiff failed to show evidence that the variance request was denied as a result of intentional discrimination and the trial court granted summary disposition to defendants. Plaintiff introduced evidence that during the hearing the ZBA focused on plaintiff's religious affiliation:

> Laporte [a ZBA member] asked if the petitioner believed that she has some additional

> right to the relief that she would not have as a non-sectarian private school without a religious affiliation based on the Constitution.
>
> Davis [an attorney for plaintiff] responded that he believes that the petitioner has rights afforded under the Constitution which do favor as a use education and religion. [June 28, 2000 ZBA meeting minutes.]

The trial court also noted that plaintiff failed to allege or prove that it was treated differently than a similarly situated person or entity. However, plaintiff did argue that it was treated differently from the Rainbow Rascals day care center in that plaintiff wanted to use the property to educate only twenty-five children, whereas Rainbow Rascals was permitted to use the premises for up to one hundred children. Although plaintiff wishes to operate a primary school, which is not listed under permitted uses or permitted accessory uses in the ordinance, the zoning ordinance also provides under § 130.2411(A):

> The Board of Appeals shall have the power and duty to authorize in specific cases a relaxation of the provisions of this Ordinance through a variance as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of this Ordinance would result in unnecessary hardship or practical difficulty.

Although a primary school for children up to the third grade (for use by employees of the office park) is not exactly the same as a day care facility, it is similar. The zoning ordinance does allow for a variance.

Plaintiff also notes that Rainbow Rascals was granted a variance to allow children of non-office park employees to attend. Therefore, plaintiff and Rainbow Rascals could be considered similarly situated in that they both wish to operate facilities for young children, and both seek (or sought) variances (Rainbow Rascals from the requirement that the children's parents work in the office park and plaintiff on the age of the children being educated in the property).

At the very least, we are not persuaded that plaintiff's request for a variance required any more of a deviation from the zoning ordinance than the variance granted to Rainbow Rascals. Given that Rainbow Rascals was a secular day care center, whereas plaintiff's proposed use involved religious education, reasonable minds could differ with regard to whether plaintiff and Rainbow Rascals were similarly situated. Therefore, the trial court erred in granting defendants' motion for summary disposition on plaintiff's equal protection claim because genuine issues of material fact remain.

VI. APPEAL FROM THE ZBA DECISION

Plaintiff next argues that the trial court improperly considered defendants' motion for summary disposition as it related to plaintiff's claim of appeal from the ZBA decision. We disagree. However, plaintiff goes on to argue that even if the trial court were permitted to rule on this appeal, this court should reverse the decision because the ZBA acted contrary to law by violating RLUIPA. On the basis of our analysis of plaintiff's RLUIPA claim, we agree that summary disposition on this claim was premature.

With regard to plaintiff's appeal of the ZBA's decision, the trial court stated in a footnote of its opinion and order:

> It should be noted that a claim of appeal from a ZBA decision is not properly decided using the standards for a motion for summary disposition. See *Carleton Sportsman's Club v Exeter Twp*, 217 Mich App 195, 201-02 [550 NW2d 867] (1996) (the trial court erred when it decided the case on the parties' motions for summary disposition, using the standards for summary disposition under MCR 2.116(C)(8) and 2.116 (C)(10), rather than deciding whether the decision was supported by competent, material and substantive evidence on the record and authorized by law.) The parties here, however, have addressed the correct standard for deciding an appeal, and the Court therefore has construed their arguments as arguments on appeal rather than on summary disposition.

The court concluded:

> In conclusion, this Court affirms the decision of the ZBA and finds that it was legally correct and based on competent, material, substantial evidence on the record.

Plaintiff correctly argues that summary disposition is not an appropriate remedy when a trial court acts as an appellate court. However, here, the trial court clearly stated that it construed the arguments on this issue as arguments on appeal rather than on summary disposition. Plaintiff argues that the language of this footnote is disingenuous, yet there is nothing in the

record to suggest that this assertion has merit. The trial court used the proper standard when reviewing plaintiff's appeal of the ZBA's decision.

Plaintiff next argues that, if the trial court did have the authority to rule on this appeal, the decision should be reversed. In *Reenders v Parker*, 217 Mich App 373, 378; 551 NW2d 474 (1996), this Court stated:

> The decision of a zoning board should be affirmed by the courts unless it is (1) contrary to law, (2) based on improper procedure, (3) not supported by competent, material, and substantial evidence on the record, or (4) an abuse of discretion. [*Id.* at 378.]

The trial court erred in granting defendants' motion for summary disposition with regard to plaintiff's RLUIPA and equal protection claims. As a result, the trial court's decision of the appeal from the ZBA decision was premature. Depending upon the ultimate resolution of the other claims, it is possible that the ZBA's decision is contrary to law and should be reversed. Therefore, we remand this issue for a resolution consistent with the ultimate determination of the other issues.

VII. SUBSTANTIVE DUE PROCESS

Plaintiff next argues that the trial court erred when it determined that plaintiff had failed to state a claim of violation substantive due process. We disagree.

Both the state and federal constitutions prohibit the taking of private property for public use without just compensation. US Const, Am V; Const 1963, art

10, § 2; *Adams Outdoor Advertising v East Lansing (After Remand)*, 463 Mich 17, 23; 614 NW2d 634 (2000). A land use regulation may effectuate a taking when the regulation (1) does not substantially advance a legitimate state interest or (2) denies an owner economically viable use of his land. *K & K Construction, Inc v Dep't of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998). To establish that a regulation does not substantially advance a legitimate state interest, and thus violates a landowner's substantive due process rights, the landowner must prove "(1) that there is no reasonable governmental interest being advanced by the present zoning classification or (2) that an ordinance is unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question." *Frericks v Highland Twp*, 228 Mich App 575, 594; 579 NW2d 441 (1998).

Three rules of judicial review apply: "'(1) the ordinance is presumed valid; (2) the challenger has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of the property; that the provision in question is an arbitrary fiat, a whimsical *ipse dixit*; and that there is not room for a legitimate difference of opinion concerning its reasonableness; and (3) the reviewing court gives considerable weight to the findings of the trial judge.'" *Id.*, quoting *A & B Enterprises v Madison Twp*, 197 Mich App 160, 162; 494 NW2d 761 (1992).

Plaintiff does not use the above-mentioned framework in its analysis of its substantive due process argument. Instead, plaintiff asserts that the zoning ordinance at hand is invalid because it does not

bear a real and substantial relationship to public health, safety, and welfare. Plaintiff further argues that the Michigan Constitution states that education and religion are to be favored and promoted,[6] and that by preventing plaintiff's proposed use of this space, defendants are interfering with this mandate and are acting contrary to law.

Although not articulated clearly, it appears that plaintiff is arguing that the township's ordinance is unlawful because it does not allow schools in OP districts. We find that the exclusion of schools from OP districts under the Ann Arbor Charter Township Zoning Ordinance is reasonable and serves a legitimate governmental interest connected to the public's health, safety, and welfare. Presuming the ordinance to be valid, plaintiff has failed to satisfy its burden to prove otherwise. The trial court did not err in summarily dismissing plaintiff's substantive due process claim.

VIII. VAGUENESS

Plaintiff argues that defendants' ordinance is void for vagueness because it allows for arbitrary enforcement. We disagree. All statutes and ordinances are given a strong presumption of constitutionality.

---

[6] "Michigan has an equally deep rooted commitment to education." *People v DeJonge (After Remand)*, 442 Mich 266, 288; 501 NW2d 127 (1993). "'Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged.'" *Id.* at 288-289, quoting Const 1963, art 8, § 1 (noting that Article 8, § 1 of our constitution parallels the language of the Northwest Ordinance of 1787).

Taylor Commons v City of Taylor, 249 Mich App 619, 625; 644 NW2d 773 (2002). Accordingly, "'courts have a duty to construe a statute as constitutional unless unconstitutionality is clearly apparent.'" *Wysocki v Felt*, 248 Mich App 346, 355; 639 NW2d 572 (2001), quoting *Mahaffey v Attorney General*, 222 Mich App 325, 344; 564 NW2d 104 (1997). As this Court held in *Wysocki, supra* at 356, "'[t]he court will not go out of its way to test the operation of a law under every conceivable set of circumstances. The court can only determine the validity of an act in the light of the facts before it. Constitutional questions are not to be dealt with in the abstract.'" *Id.*, quoting *General Motors Corp v Attorney General*, 294 Mich 558, 568; 293 NW 751 (1940). These same rules govern the review of the constitutionality of an ordinance, *Plymouth Twp v Hancock*, 236 Mich App 197, 199; 600 NW2d 380 (1999), and it is the burden of the party challenging the validity of the ordinance (here plaintiff) to establish that the ordinance is clearly unconstitutional. *Gora v City of Ferndale*, 456 Mich 704, 711-712; 576 NW2d 141 (1998).

In *Dep't of State v Michigan Ed Ass'n—NEA*, 251 Mich App 110, 116; 650 NW2d 120 (2002), this Court set forth the three ways in which to challenge an ordinance on the basis that it is unconstitutionally vague:

> "A statute may qualify as void for vagueness if (1) it is overbroad and impinges on First Amendment freedoms, (2) it does not provide fair notice of the conduct it regulates, or (3) it gives the trier of fact unstructured and unlimited discretion in determining whether the statute has been violated." [*Id.*, quoting *Proctor*

v White Lake Twp Police Dep't, 248 Mich App 457, 467; 639 NW2d 332 (2001).]

This Court also pointed out that in determining "whether a statute is void for vagueness, a court should examine the entire text of the statute and give the words of the statute their ordinary meanings." *People v Piper*, 223 Mich App 642, 646; 567 NW2d 483 (1997); see also *In re Forfeiture of 791 N Main*, 175 Mich App 107, 111; 437 NW2d 332 (1989). In line with this principle, it is critical for courts to remember that, when considering whether an ordinance is void for vagueness, we do "not set aside common sense, nor is the [township board] required to define every concept in minute detail. Rather, the statutory language need only be reasonably precise." *Dep't of State*, *supra* at 120.

In the present case, plaintiff has failed to set forth facts to support that this ordinance is (1) overbroad and impinges on First Amendment freedoms, (2) does not provide fair notice of the conduct it regulates, or (3) gives the trier of fact unstructured and unlimited discretion in determining whether the statute has been violated. Instead, plaintiff's argument on this issue is minimal. Plaintiff asserts that the township's ordinance is void because it allows arbitrary enforcement. The basis for plaintiff's arbitrariness argument is that plaintiff seeks to use the premises in a less intensive manner than that allowed for day care centers, i.e., twenty-five children in a primary school as opposed to approval for up to one hundred children in a day care center. According to plaintiff, this inconsistency evidences the arbitrariness in which the township's ordinance is being enforced.

Plaintiff fails to reference any particular ordinance language, nor does plaintiff explain or cite law with respect to the particular deprivation under due process and the tie-in with the void-for-vagueness doctrine. We assume that plaintiff is asserting that it is being deprived of a "property" interest by an ordinance that permits unfettered discretion. We note that typically, a void-for-vagueness argument is raised in a challenge to a penal statute or ordinance that proscribes certain behavior for which there is a penalty such as jail time or fines. See *Grayned v City of Rockford*, 408 US 104, 92 S Ct 2294; 33 L Ed 2d 222 (1972); *People v Morey*, 230 Mich App 152; 583 NW2d 907 (1998) (the only two cases cited by plaintiff); see also *People v Lynn*, 229 Mich App 116; 580 NW2d 472 (1998). This is not to say that deprivation of a property interest cannot form the basis of a void-for-vagueness argument, but plaintiff simply fails to elaborate or explain its theory in any meaningful manner. As our Supreme Court stated in *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959):

> "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow."

Additionally, even if we look at plaintiff's argument substantively, the argument lacks merit. In regard to OP districts, the Ann Arbor Charter Township Zoning

Ordinance clearly and unambiguously indicates that day care facilities are a permitted accessory use, there is nothing vague about the language. Further, § 130.1006 makes absolutely no reference to a school of any kind being a permitted use. Therefore, assuming that plaintiff has a property interest in using the premises as a school, that interest was not deprived through the implementation of a vague ordinance providing unfettered and arbitrary discretion. Rather, the ordinance is not vague and provides clear guidelines on permitted uses.

Plaintiff's argument stems more from the variance request seeking to expand day care operations beyond the children of people who worked in the office park, and the township's approval of the variance, which allowed for up to one hundred children at the day care facility. A review of ordinance § 130.2411 with respect to variances fails to reveal any language that would give the ZBA unfettered and arbitrary discretion in granting variances. Indeed, the standards for approval of a variance request are well-defined in § 130.2411. Plaintiff's argument is not a complaint that the ordinance is vague, but, rather, reflects a disagreement with the exclusion under § 130.1006 of schools from an OP district, and a disagreement with how the township exercised its discretion when granting the variance expanding the use of the day care facility. This is simply not a basis to find the ordinance void for vagueness, and the trial court did not err in dismissing the claim.

IX. PROCEDURAL DUE PROCESS

Plaintiff next argues that defendant township's ordinance violates the Due Process Clause of the

Fourteenth Amendment. We disagree. The full extent of plaintiff's procedural due process argument is that the township's zoning ordinance is void for vagueness, thereby violating the Due Process Clause of the Fourteenth Amendment. We rejected plaintiff's void-for-vagueness argument above; therefore, it is similarly rejected here, and there is no basis to address the issue any differently in the context of a procedural due process argument. Moreover, we note that the void-for-vagueness doctrine, although arising out of the Due Process Clause, does not relate specifically to procedural due process, but rather relates to substantive due process. *In Dep't of State, supra* at 116, this Court stated:

> To determine whether a statute is void for vagueness, a court should examine the entire text of the statute and give words of the statute their ordinary meanings. Substantive due process requires standards in a statute to be "reasonably precise" in order to ensure that individuals are not held responsible by the state for conduct that they could not reasonably understand to be proscribed. [Citations omitted.]

Plaintiff's procedural due process argument, therefore, fails on multiple levels, and the trial court's ruling dismissing the claim is affirmed.

X. SUPERINTENDING CONTROL

Plaintiff next argues that the trial court erred in denying the petition for superintending control. We disagree. The grant or denial of a petition for superintending control is within the sound discretion

of the court; absent an abuse of discretion, the Court of Appeals will not disturb the denial of such a request. MCR 3.302.

The writ of superintending control supersedes the writs of certiorari, mandamus, and prohibition, and provides one simplified procedure for reviewing or supervising a lower court or tribunal's actions. MCR 3.302(C). The filing of a complaint for superintending control is not an appeal, but, rather, is an original civil action designed to order a lower court to perform a legal duty. *Barham v Workers' Compensation Appeal Bd*, 184 Mich App 121, 127; 457 NW2d 349 (1990). Superintending control is an extraordinary power that the court may invoke only when the plaintiff has no legal remedy and demonstrates that the court has failed to perform a clear legal duty. *In re Recorder's Court Bar Ass'n v Wayne Circuit Court*, 443 Mich 110, 134; 503 NW2d 885 (1993); *Czuprynski v Bay Circuit Judge*, 166 Mich App 118, 121-122; 420 NW2d 141 (1988). Therefore, if a plaintiff has a legal remedy by way of appeal, the court may not exercise superintending control and must dismiss the complaint. *Barham, supra* at 127; MCR 3.302(D).

Here, the trial court did not abuse its discretion in denying the petition because plaintiff did not establish grounds for issuing the order. See *In re Rupert*, 205 Mich App 474, 478; 517 NW2d 794 (1994). The trial court properly declined to issue an order of superintending control because plaintiff had an adequate legal remedy. *Barham, supra* at 127; MCR 3.302(D).

XI. PRELIMINARY INJUNCTION

Plaintiff argues that the trial court erred in denying plaintiff's motion for a preliminary injunction. The trial court's opinion and order merely noted, at the end of the opinion, that the motion for a preliminary injunction was denied. The trial court, having extensively reviewed and analyzed plaintiff's statutory and constitutional arguments, had no need to substantively address the injunction issue because all alleged causes of action were dismissed. There is no substantive decision or analysis by the trial court for us to review on the matter of plaintiff's request for a preliminary injunction. We, therefore, choose not to address this issue on appeal. Because plaintiff's claims under RLUIPA and equal protection were improperly dismissed and now survive, plaintiff is free to renew its motion for a preliminary injunction for the trial court to consider anew under the legal principles governing preliminary injunctions.

XII. CONCLUSION

We reverse the trial court's grant of defendants' motion of summary disposition of plaintiff's claim under RLUIPA and rule that plaintiff did establish a jurisdictional requirement of RLUIPA, namely an individualized assessment 42 USC 2000cc(a)(2)(C). Further, we determine that there remain genuine issues of material fact on the issue of substantial burden on religious exercise and remand this case for further proceedings consistent with this opinion of this issue.

We reverse the trial court's grant of defendants' motion for summary disposition of plaintiff's equal

protection claim and remand for further proceedings consistent with this opinion.

We remand to the trial court the issue of the appeal from the ZBA for a resolution consistent with this opinion and consistent with the ultimate decisio: on the other issues presented in this case.

We affirm the trial court's grant of defendants' motion for summary disposition on plaintiff's claims of substantive due process, vagueness, procedural due process, and superintending control.

In light of our ruling, plaintiff is free to renew its motion for preliminary injunction on remand should it desire to do so.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

Owens, J., concurred.

/s/ Bill Schuette
/s/ Donald S. Owens

Murphy, P.J., I concur in the result only.

/s/ William B. Murphy

APPENDIX K

MICHIGAN CIRCUIT COURT

No. 00-1072AS

[Filed March 13, 2001]

SHEPHERD MONTESSORI CENTER MILAN, a Michigan non-profit corporation,

Plaintiff,

v

ANN ARBOR CHARTER TOWNSHIP, ANN ARBOR CHARTER TOWNSHIP ZONING OFFICIAL, and ANN ARBOR CHARTER TOWNSHIP ZONING BOARD OF APPEALS,

Defendants.

Robert L. Bunting (P24212), Oxford, Michigan, and Robert Charles Davis (P40155), Mt. Clemens, Michigan, for Plaintiff.

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION AND DENYING PLAINTIFF'S MOTIONS FOR SUMMARY DISPOSITION AND PRELIMINARY INJUNCTION

MORRIS, J.

Plaintiff filed this action against defendants Ann Arbor Charter Township (the Township), Ann Arbor Charter Township Zoning Official and the Ann Arbor Charter Township Zoning Board of Appeals (ZBA), seeking relief from the denial of a permit to use certain premises located in the Domino Farms Office Park as a private elementary school. With its complaint, plaintiff filed a motion for preliminary injunction. The Court heard that motion, as well as defendants' motion for summary disposition and plaintiff's cross motion for summary disposition, January 16, 2001. After the hearing, the parties submitted their supplemental briefs, which the Court has reviewed. Now, for the reasons stated below, defendants' motion for summary disposition is granted; and plaintiff's motions for summary disposition and for a preliminary injunction are denied.

I. *BACKGROUND*

Plaintiff operates a day care center in the Domino Farms office park, which is located in an area zoned Office Park (OP) under the defendant Township's Zoning Ordinance. Day care facilities are an expressly permitted use in OP districts; primary schools are not a permitted use. In April 2000, plaintiff notified the Township zoning official of plaintiff's intent to use additional space in the same building to add a primary

school (K-3) to its day care operation. The space had previously been occupied by the "Rainbow Rascals" day care facility. Rainbow Rascals initially operated a day care solely for children of people working within the office park, but later obtained a variance allowing the general public to use its day care services.

The Township zoning official informed plaintiff by letter that the proposed primary school use was not permitted in an OP district. On May 30, 2000, plaintiff petitioned the ZBA for (1) reversal of the official's decision, (2) a use variance or (3) a substituted non-conforming use.

At the hearing of plaintiff's petition, held on June 28, 2000, the ZBA upheld the official's decision, finding that a primary school was not a permitted use in an OP district. In addition, it found that the previous use of the property (the Rainbow Rascals day care) was a permitted use, not a non-conforming use, and therefore plaintiff's proposed use could not be a substituted non-conforming use. It also denied plaintiff's request for a use variance.

On September 22, 2000, the Religious Land Use and Institutionalized Persons Act ("RLUIPA") went into effect. On October 26, 2000, the minutes of the June 28, 2000, ZBA meeting/hearing were certified.

On November 2, 2000, plaintiff served defendant with the complaint, in which it asserted a claim of violation of the RLUIPA (Count I), appeal from the decision of the ZBA (Count II), violation of its rights to substantive due process and equal protection (Count III), that the Township Zoning Ordinance is void for vagueness (Count IV), seeking an order of

superintending control (Count V), violation of its right to procedural due process (Count VI) and that the defendants' actions and ordinance were unreasonable (Count VII).

III. *ANALYSIS*

A. *COUNT I: violation of the RLUIPA*

Plaintiff and defendants have filed cross motions for summary disposition of plaintiff's claim under the RLUIPA.

The RLUIPA is Congress' response to the United States Supreme Court's decision in *City of Boerne v. Flores,* 521 U.S. 507; 117 S Ct 2157 (1997), in which the Court held the Religious Freedom Restoration Act unconstitutional ("RFRA") as beyond Congress' enforcement authority under Section 5 of the Fourteenth Amendment and a violation of the Constitution's separation of powers. Congress has attempted to limit the scope of the Act to the bounds of Congress' powers to legislate under Section 5 and the Commerce Clause. For cases within its scope, the RLUIPA prohibits any substantial burden on the religious exercise of a person unless the government demonstrates that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 USC 2000cc. Plaintiff claims that the Township's denial of the requested use variance or substituted nonconforming use constitutes a substantial burden on plaintiff's exercise of religion, and that the Township cannot demonstrate that the imposition of that burden is in furtherance of a compelling governmental interest

and is the least restrictive means of furthering that interest.

1. Substantial burden on plaintiff's exercise of religion

To come within the RLUIPA, plaintiff must show that the Township's Zoning Ordinance imposes a substantial burden on plaintiff's religious exercise. The term "substantial burden" is to be interpreted by reference to Supreme Court jurisprudence. Joint Statement of Senator Hatch and Senator Kennedy on RLUIPA, Congressional Record, p. S7776. A state law places a "substantial burden" on the free exercise of religion when the law either conditions receipt of an important benefit upon conduct proscribed by a religious faith, or pressures the adherent to modify his behavior and to violate his beliefs. *Jimmy Swaggart Ministries v Board of Equalization of California,* 493 U.S. 378, 391-92; 110 S Ct 688 (1990). The economic cost of complying with a generally applicable law is not sufficient to establish a substantial burden on the free exercise of religion.

Defendant argues that, assuming the operation of a Montessori school is a religious exercise, the Township has not placed a substantial burden on it. The ordinance, defendant asserts, does not pressure plaintiff to refrain from teaching school, Montessori or Catholic or other, and does nothing to discourage anyone's religious beliefs. That plaintiff will have to locate its K-3 school in a different zoning district does not amount to a substantial burden on plaintiff's religious exercise.

Plaintiff asserts that denial of the use variance substantially burdens its right of free exercise.

Plaintiff argues that because it has pled in its complaint that defendants' conduct has imposed a substantial burden on plaintiff's religious exercise, that allegation must be accepted as true for purposes of this motion. That argument is contrary to MCR 2.116(G)(4), which provides that when a motion under subrule (C)(10) is made, the adverse party may not rest upon the mere allegations of his pleading, but must set forth *specific facts* showing there is a genuine issue for trial.

It is not obvious, as a matter of common sense, that plaintiff's free exercise is indeed burdened: plaintiff could operate its K-3 school anywhere that primary schools are a permitted use, and it has not even alleged that it could not do so. It is possible to read between the lines that employees in the Domino's Farms office park have had their children in the Montessori day care, the children have grown to K-3 age, and the employees want to continue to have them go to school in the same place they have been attending day care, in the office park. If this inference is correct, however, the inconvenience attendant upon the denial of the use variance or substituted nonconforming use does not rise to the level of "substantial burden."

Plaintiff's claim is defective, however, in that plaintiff makes only conclusory, general allegations of substantial burden. Neither the complaint nor the materials submitted with the motions for summary disposition contains factual allegations that the ordinance pressures plaintiff not to operate, or plaintiff's students not to attend, a Catholic school. Plaintiff does not demonstrate that it would be difficult or impossible for it to operate its school anywhere else,

or that the Domino's Farm office park is the only place where there is need for a Catholic elementary school. Plaintiff's blanket, generalized, unsupported assertions ("the fate of the entire religious school which will be destroyed if this Court does not grant the Plaintiff's relief," Plaintiff's Response, p. 17) do not meet plaintiff's burden of production on a motion for summary disposition; and blanket, generalized assertions in the legislative history cannot substitute for evidence of substantial burden or discrimination in a particular case.

2. Effective date.

The RLUIPA's effective date is September 22, 2000. Defendant argues that the Act does not apply to the present case because the determinative event of this action (the ZBA hearing, 6/28/00) preceded the Act's effective date (9/22/00), and the Act does not expressly provide for retroactive application. *See Martin v. Hadix*, 527 U.S. 343; 119 S Ct 1998 (1999), *Landgraf v. USI*, 511 U.S. 244, 280; 114 S Ct 1483 (1994) (test for retroactivity). Plaintiff argues that the operative event was not the hearing/oral decision, but the certification of the ZBA minutes on 10/26/00. The ZBA decision did not become formal or appealable until then, *see Davenport v. Grosse Point Farms ZBA*, 210 Mich.App 400 (1995); the RLUIPA was already effective and therefore applies to the present case. The Court agrees with plaintiff that the claim arose after RLUIPA became effective.

3. Jurisdictional requirements.

a. *Effect on interstate commerce*

Arguments. RLUIPA prohibits a government from imposing a substantial burden on a person's religious exercise, and applies when (A) the burden is imposed in a program/activity the receives federal financial assistance; (B) the burden affects interstate commerce; or (C) the burden is imposed by a land use regulation under which a government makes/can make individualized assessments of the proposed land use. 42 USC 2000cc(a)(2). It is undisputed that the present case does not fall within subsection (A) since the Township's zoning program is not one that receives federal financial assistance.

Defendant argues that the present case does not fall within subsection (B) because the burden the Zoning Ordinance imposes on plaintiff's religious practice does not substantially affect interstate commerce. Although RLUIPA does not expressly require that the alleged burden *substantially* affect commerce for it to apply, Congress' power to legislate with respect to interstate commerce is constitutionally limited to matters that *substantially* affect interstate commerce. *See U.S. v. Lopez*, 514 U.S. 549; 115 S Ct 1624 (1995) (invalidating the Gun Free Schools Act because Congress exceeded its Commerce Clause authority), *US v. Morrison*, 549 U.S. 598; 120 S Ct 1740 (2000) (invalidating the Violence Against Women Act for the same reason), *US v. Faasse*, 227 F3d 660 (CA6 2000) (Child Support Recovery Act). According to defendant, the operation of a zoning ordinance specifying where in a municipality a school may be located is purely an intrastate concern, and, therefore,

the Act's commerce power "jurisdictional hook" -subsection (B)- does not apply.

Plaintiff asserts that, in addition to the lease of premises, plaintiff engages in commercial transactions that include purchases of books, supplies, and desks, and payment of salaries and other expenses. Plaintiff argues that because the effect of the Township's Ordinance and decision is to prevent plaintiff from entering into a lease and from purchasing materials from interstate suppliers, the Ordinance and decision affect interstate commerce as contemplated in the legislative history. To support its argument that this type of case is one intended by Congress to come within the Act as one affecting interstate commerce, plaintiff cites testimony included in the Congressional Record, 146 Cong Rec S7774-01 (July 27, 2000):

> The jurisdictional element in this bill is that, in each case, the burden on religious exercise, or removal of that burden, will affect interstate commerce. This will most commonly be proved by showing that the burden prevents a specific economic transaction in commerce, such as a construction project, purchase or rental of a building, or an interstate shipment of religious goods. The aggregate of all such transactions is obviously substantial, and this is confirmed by data presented to the House Subcommittee on the Constitution (testimony of Marc D. Stern (June 16, 1998)).

Plaintiff distinguishes *Lopez* and *Morrison* as involving the regulation of clearly non-commercial activities (possession of guns on school property and gender-related crimes of violence, respectively, are not

economic activities), as opposed to the commercial activities in which plaintiff engages.

Discussion. The United States Supreme Court has addressed the scope of Congress' Commerce Clause powers in several recent cases, including *Lopez*, *supra*, and *Morrison*, *supra*. In these cases, the majority established more clearly the limitations on those powers, concluding that for Congress to be able to regulate an activity, that activity must substantially affect interstate commerce. In *Lopez*, the Court held invalid the Gun-Free Schools Act, which criminalized the possession of a gun in a local school zone:

> Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.
>
> Second, § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. For example, in *United States v. Bass*, 404 U.S. 336; 92 S.Ct. 515; 30 L.Ed2d 488 (1971), the Court interpreted former 18 USC 1202(a), which made it a crime for a felon to

> "receiv[e], posses[s], or transpor[t] in commerce or affecting commerce ... any firearm." 404 U.S. at 337; 92 S Ct at 517. The Court interpreted the possession component of § 1202(a) to require an additional nexus to interstate commerce both because the statute was ambiguous and because "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Id* at 349; 92 S Ct at 523. The *Bass* Court set aside the conviction because, although the Government had demonstrated that Bass had possessed a firearm, it had failed "to show that requisite nexus with interstate commerce." *Id* at 347; 92 S Ct at 522.... Unlike the statute in *Bass*, § 922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.

The government argued in *Lopez* that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy by causing substantial costs that, through insurance, are spread throughout the population; by reducing the willingness of individuals to travel to unsafe areas of the country; and by threatening the learning environment. The Court rejected the government's argument, pointing out that, under the government's reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens, including family law and education.

The Court also observed that, although as part of its independent evaluation of constitutionality under the Commerce Clause it of course considered legislative findings, and indeed even congressional committee findings, regarding an activity's effect on interstate commerce, neither the statute nor the legislative history contained such express findings. It agreed with the government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce, but, to the extent that congressional findings would enable the Court to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, they were lacking. *Id*, 514 U.S. at 562-63; 115 S Ct at 1631-32. It concluded:

> The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.
>
> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to

> congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. *Lopez*, 514 U.S. at 567; 115 S Ct at 1633 (citation omitted).

The Court revisited the question of what limits the Constitution imposes on congressional Commerce Clause powers in *Morrison*, *supra*, this time addressing the validity of the Violence Against Women Act, 42 USC 13981 ("VAWA"), which provided a federal civil remedy for the victims of gender-motivated violence. In its opinion, the Court discussed in detail its earlier decision in *Lopez*. It then compared the VAWA with the Gun Free School Zones Act, noting that the former, like the latter, contained no jurisdictional element supporting the argument that the statute was sufficiently tied to Congress' Commerce Clause power. Unlike the Gun Free School Zones Act, however, the VAWA was supported by numerous congressional findings regarding the serious impact that gender-motivated violence has on victims and their families.

> But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, " '[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." ' ... Rather, " '[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative

> question, and can be settled finally only by this Court." '
>
> In these cases, Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. *Morrison*, 120 S Ct at 1752 (citations omitted).

That method of reasoning was the one the Court had rejected in *Lopez*, *i.e.*, the government's "but-for" causal chain from the initial occurrence of violent crime to "every attenuated effect upon interstate commerce." *Id.* Thus, despite the existence of congressional findings concerning the effect on interstate commerce of gender-related violence, the Court again rejected the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. *Id.* 120 S Ct at 1754.

In the present case, the Act at issue-the RLUIPA-is supported by congressional findings that the regulated activity affects interstate commerce. These findings tend to support the argument that the Act is properly within Congress' Commerce Clause authority. A court reviewing a claim under the Act, however, under the above-cited Supreme Court decisions, must make an independent, judicial determination that the regulated activity substantially affects interstate commerce. As Congress no doubt was aware, the RLUIPA regulates an incredibly broad range of activities, such that without a jurisdictional element, it would vastly overstep constitutional bounds on Congress' authority.

To ensure that the Act reached no further than the constitutional limits on its commerce clause authority, however, Congress included such a jurisdictional element, requiring that there be a showing *in each case* brought under § 2(a)(2)(B) that the burden on free exercise alleged affect interstate commerce. If more than one interpretation of the statute is possible, one of which would render the statute unconstitutional, this Court must construe the statute so as to render it constitutional if possible. *Edward J DeBartolo Corp v Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575; 108 S Ct 1392, 1397 (1988), *NLRB v Catholic Bishop of Chicago*, 440 U.S. 490, 500; 99 S Ct 1313, 1318 (1979).[1]

Plaintiff points to two types of commercial transactions that the Zoning Ordinance as applied will preclude: the lease of premises on which plaintiff would operate the school, and the purchases from out-of-state suppliers of school supplies. Although the connection between the alleged burden on free exercise and the effect on interstate commerce is closer than in

---

[1] "[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500; 99 S Ct 1313, 1318 (1979). Under this canon of statutory construction, "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J DeBartolo Corp v Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575; 108 S Ct 1392, 1397 (1988), quoting *Hooper v. California*, 155 U.S. 648, 657; 15 S Ct 207, 211 (1895). "[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Blodgett v. Holden*, 275 U.S. 142, 148; 48 S Ct 105, 107 (1927) opinion of Holmes, J.)

Lopez and *Morrison*, the alleged burden still does not rise to the level of a substantial, rather than an incidental, effect on interstate commerce. First, the lease relates to real property-a classically, strictly local concern. For this Court to find that plaintiff's entering into the lease for additional space with a local property owner substantially affects interstate commerce would be tantamount to finding that any commercial transaction-any exchange of payment for property or services-substantially affects interstate commerce. Plaintiff's suggested interpretation of the RLUIPA would greatly exceed Congress' Commerce Clause authority, and this Court must therefore reject it in favor of one which does not do so. Transactions concerning real property and zoning ordinances are intrastate matters that do not, without some real connection to another state or states, come within Congress' power to regulate.

Neither do the purchases from out-of-state sources of schoo' supplies satisfy the jurisdictional requireme[illegible]r the same reason: any causal link between the Township's denial of a use variance and an effect on interstate commerce in school supplies is indirect, incidental and tenuous. Furthermore, plaintiff's purchase of supplies will be the same no matter where the school is located; the Township's denial of a use variance should not restrict or preclude these transactions at all.

b. *Individualized assessments of land use*

Section 2(a)(2)(C) of the RLUIPA makes it applicable to local land use regulatory systems with formal or informal procedures that permit the government to make individualized assessments of

proposed land uses. As explained in the Joint Statement of Senator Hatch and Senator Kennedy, at 146 Cong Rec S7774-01, S7775, this section gives the Act a "third constitutional base":

> The land use sections of the bill have a third constitutional base: they enforce the Free Exercise and Free Speech Clauses as interpreted by the Supreme Court. Congress may act to enforce the Constitution when it has "reason to believe that *many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.*" *City of Boerne v Flores,* 521 U.S. 507, 532 (1997). The standard is not certainty, but "reason to believe" and "significant likelihood."

This section extends the Act to cases that fall within Congress' enforcement powers under Section 5 of the Fourteenth Amendment as defined by the Supreme Court in *City of Boerne v. Flores,* 521 U.S. 507; 117 S Ct 2157 (1997). This section *limits* application of the Act to cases involving "individualized assessments" by government of proposed (religious) land uses. The term "individualized assessments," as used in the Act, derives from the Supreme Court's opinions in *Flores, id, Church of the Lukumi Babalu Aye, Inc, v City of Hialeah,* 508 U.S. 520; 113 S Ct 2217 (1993), *Employment Div, Dep't of Human Resources of Oregon v Smith,* 494 U.S. 872, 888; 110 S Ct 1595, 1605 (1990), and *Sherbert v. Verner,* 374 U.S. 398; 83 S Ct 1790 (1963), in which the Court reiterated that when a government makes individualized exemptions to an otherwise generally applicable law, the government may not refuse to extend those exemptions to cases of religious hardship without compelling justification.

The applicability of § 2(a)(2)(C) must be determined in light of the Court's opinions in those cases.

In *Flores,* the Supreme Court overturned the RLUIPA's predecessor, the RFRA, 42 USC 2000bb *et seq.* Like the RLUIPA, the RFRA prohibited government from substantially burdening a person's exercise of religion, even if the burden results from a rule of general applicability, unless the government could demonstrate that the burden was in furtherance of a compelling governmental interest and was the least restrictive means of furthering that interest. In enacting RFRA, Congress relied on its power to enforce the Fourteenth Amendment's due process and equal protection guarantees with appropriate legislation.

The Supreme Court stated that legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if, in the process, it prohibits conduct that is not itself unconstitutional and intrudes into legislative areas previously reserved to the states. *Flores,* 521 U.S. at 518; 117 S Ct at 2163. Although Congress could certainly enact legislation enforcing the constitutional right to free exercise of religion, its power to enforce is only preventive or remedial. Congress does not have the power to decree the substance of the Fourteenth Amendment or the Free Exercise Clause, nor to determine what constitutes a constitutional violation. *Id,* 521 U.S. at 519; 117 S Ct at 2163-64. For legislation to constitute a remedial action properly within Congress' enforcement power,

> [t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted

> to that end. Lacking such a connection, legislation may become substantive in operation and effect. *Id,* 521 U.S. at 520; 117 S Ct at 2164.

The constitutional propriety of legislation adopted under the Enforcement Clause must be judged with reference to the historical experience it reflects, the Court continued. For example, the Voting Rights Act of 1965, which prohibited the use of literacy tests as a qualification for voting, was held to be valid, remedial legislation in light of the pervasive, discriminatory use of literacy tests to disenfranchise minorities.

In contrast to the record in the voting rights cases, RFRA's legislative record lacked examples of modern instances of generally applicable laws passed because of religious bigotry. Rather, the emphasis of the hearings was on laws of general applicability that placed incidental burdens on religion, such as, *inter alia,* the "zoning regulations and historic preservation laws (like the one at issue here), which as an incident of their normal operation, have adverse effects on churches and synagogues." *Id,* 521 U.S. at 531; 117 S Ct at 2169. Congress' concern was with the incidental burdens imposed, not the object or purpose of the legislation.

But regardless of the legislative record, the court continued, RFRA was so "out of proportion to a supposed remedial or preventive object that it could not be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections." *Id,* 521 U.S. at 532; 117 S Ct at 2170. In contrast to the Voting Rights Act, RFRA was not confined to particular regions of the country

and to a discrete class of state laws; its "sweeping coverage ensures it intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." The stringent test RFRA demanded of state laws-requiring that they pass strict scrutiny upon an objector's allegation that the law substantially burdens his or her free exercise-" 'would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." ' *Id, citing Smith, supra,* 494 U.S. at 888; 110 S Ct at 1605 (1990).

> The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith.* Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry. If a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative motive. RFRA's substantial-burden test, however, is not even a discriminatory effects or disparate-impact test. It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of

> religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs. *Flores,* 521 U.S. at 534-35; 117 S Ct at 2171 (citations omitted)

Because RFRA was so much broader than was appropriate if its goal was to prevent and remedy constitutional violations, the Court held, it violated the principle of separation of powers and was unconstitutional.

There are two basic principles, it seems to this Court, that derive from the line of cases culminating in *Flores* and *Lukumi Babalu Aye,* that Congress has incorporated in § 2(a)(2)(C) and which must govern application of the RLUIPA. First, the Act must be construed as remedial only, and can only be applied to remedy governmental action that the record demonstrates has a significant likelihood of being unconstitutional-here, that has a significant likelihood of violating plaintiff's right of free exercise.

Second, Congress has the power to legislate cases involving individualized exemptions because to deny an exemption for a religious purpose or motivation while granting it to other purposes or motivations violates the right to free exercise. The individualized assessments discussed in *Employment Div v. Smith, supra,* which were the subjects of the free exercise claims to which the Supreme Court applied strict scrutiny in *Sherbert v. Verner,* 374 U.S. 398; 83 S Ct 1790 (1963), were determinations, for purposes of awarding unemployment benefits, whether the

applicant employees had "good cause" for quitting their jobs. Benefits had been denied to individuals whose resignations were religiously motivated, and the Court held it was a violation of the individuals' free exercise rights to treat their religious beliefs as less justified or less important than other motivations.

The evil Congress intended to remedy with this section of the Act, is the alleged widespread discrimination against churches and synagogues, in the consideration of individual land use applications (like the consideration of individual applications for unemployment benefit exemptions in *Sherbert*), which is more often covert than overt:

> The hearing record compiled massive evidence that [the right to build, buy or rent space to assemble for religious purposes] is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes *and also in the highly individualized and discretionary processes* of land use regulation....
>
> Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church ... More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or "not consistent with the city's land use plan."

* * *

> The hearing record demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes. These *individualized assessments* readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case. Joint Statement of Senator Hatch and Senator Kennedy on the RLUIPA of 2000, 146 Cong Rec at S7774, S7775 (emphasis supplied).

The limitation on application to discretionary action only is stated by Rep. Charles Canady: § 2(a)(2)(C) of the Act "applies the General Rule to cases in which the government has authority to make individualized assessments of the uses to which the property is put. Unlike the Commerce and Spending clause sections, this section does not reach generally applicable laws. Laws that provide for individualized assessments of proposed uses are not generally applicable." Statement of Rep. Charles Canady, Defendants' Brief, Exhibit B.[2]

---

[2] A cynical observer might believe that Congress, despite the language limiting the Act's application to cases involving land use regulations providing for "individualized assessments," was attempting to reach exactly the same spectrum of cases it sought to reach with the RFRA; and that by including the magic words that it was "codifying" the standards enunciated by the Supreme Court in its recent federalism cases, it was simply attempting to insulate the RLUIPA from the challenges that shot down the RFRA rather than really redefining the scope of the Act. Congress' *apparent* intent to reach all land use cases and its express intent to reach only the cases within the scope of its enforcement power as delineated by the *Flores* Court are, it seems to this Court, mutually inconsistent.

Congress' concern regarding land use regulations is that systems providing for individualized, discretionary assessments by the government–such as, for example, a municipality's consideration of an application for a building permit, an application for exemption from a historical building preservation ordinance or a land use variance–allow a municipality to conceal its discriminatory intent under ostensibly legitimate, but vague, considerations. Thus, an individualized assessment, for purposes of this section of the Act, is a *discretionary* decision by a land use authority, one in which the applicant's religious purpose may be either expressly or covertly considered and, possibly, used as a basis for denial by the authority in reaching its decision.

Plaintiff argues that the decisions it challenges, and for which the Township's zoning ordinance provides, are individualized assessments pursuant to a system of land use regulation. The Township, plaintiff states, receives individual requests from citizens who want permission to use particular properties in specific ways, considers the merits of those individual requests and relevant facts and issues a decision permitting or restricting the proposed use. Given the Court's obligation to construe legislation in such a way as to make it constitutional, if possible, however, the Supreme Court's opinion in *Flores*, *Smith* and *Sherbert* do not permit this Court to construe the Act as plaintiff suggests.

Plaintiff challenges three separate decisions by the ZBA: the affirmance of the Zoning Administrator's decision that a primary school was not a permitted use on the OP district; the denial of plaintiff's application for a use variance; and the denial of plaintiff's request

for a substituted nonconforming use. Whether this case comes within § 2(a)(2)(C) depends on whether any of those decisions can be considered an "individualized assessment" within the meaning of the Act.

The ZBA's affirmance of the Zoning Administrator's decision was not discretionary. The Zoning Ordinance is quite clear as to what uses are permitted in an OP district, and a primary school simply is not one of those uses. Neither the Administrator nor the ZBA had any discretion-nor, therefore, any opportunity to discriminate against the proposed use on the basis of its religious purpose. Thus, this decision by the ZBA was not an "individualized assessment" under § 2(a)(2)(C).

The Township's ordinance provides a standard for the ZBA's decision whether to grant a variance. Section 130.2411 of the ordinance provides (emphasis supplied):

> *A. Intent.* The Board of Appeals shall have the power and duty to authorize in specific cases a relaxation of the provisions of this Ordinance through a variance as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of this Ordinance would result in unnecessary hardship or practical difficulty.
>
> * * *
>
> *D. Standards of determination. A variance shall not be granted by the Board of Appeals unless and until all of the following conditions are met:*

1. A written application for a variance is submitted, demonstrating:

a. That special conditions and circumstances exist *which are peculiar to the land, structure, or building involved* and which are not applicable to other lands, structures, or buildings in the same district.

b. That literal interpretation of the provisions of this Ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of this Ordinance.

c. That the special conditions and circumstances do not result from the actions of the applicant.

d. That granting the variance requested will not confer on the applicant any special privilege that is denied by this Ordinance to other lands, structures, or buildings in the same district.

2. *Any nonconforming use of neighboring lands, structures, or buildings* in the same district, any permitted or nonconforming uses of lands, structures, or buildings in other districts, or any nonconforming structures *shall not be considered grounds for the issuance of a variance.*

* * *

4. The Board of Appeals shall further find that the reasons set forth in the application justify the granting of the variance, and that it is the

> minimum variance that will make possible the reasonable use of the land, building, or structure.

Under the standards for determination, the ZBA has some discretion-but that discretion has defined limits. Only to the extent that the ZBA's decision is discretionary is it potentially violative of plaintiff's right of free exercise; to the extent it is not discretionary, there is no potential for religious discrimination, and it cannot be considered an "individualized assessment." Thus, if the basis for denial of plaintiff's application for a variance was non-discretionary under the standards for determination, the RLUIPA does not-and constitutionally, cannot-apply to plaintiff's case.

Because plaintiff failed to make a showing that special conditions and circumstances existed that were peculiar to subject property-the space formerly used by Rainbow Rascals-and not to other property in the office park, the ZBA had no discretion to grant or deny plaintiff's application for a variance. Had plaintiff made any showing along these lines, then the ZBA could have exercised some discretion in deciding whether the showing was sufficient-but the reasons plaintiff offered for the request were (1) its opinion that the proposed primary school use was more appropriate to the space (less intense) than was the Rainbow Rascals day care center; and (2) Catholic schools are necessary for Catholic children and the parents of plaintiff's day care students had requested that plaintiff open a primary school. Indeed, after the public hearing phase of the hearing was concluded, during the board members' discussion of the application, Ms. Laporte moved to deny the variance

"for the reason [ ] that she does not believe the ZBA *has the power* to grant the variance ..." (Minutes of the ZBA Meeting, June 28, 2000, at p 4, Plaintiff's Response, Exhibit 2).

Nor was the ZBA's denial of a substituted nonconforming use an "individualized assessment." Substituted nonconforming uses may be permitted under § 130.2308 of the Township's Zoning Ordinance:

> A nonconforming use of a structure may be substituted for another nonconforming use upon permission by the Board of Appeals ... provided that no structural alterations are made, and provided, further, that such other nonconforming use is more appropriate than the existing nonconforming use in the district in which it is located.

Under this section, a substituted nonconforming use can only be granted where the previous use was nonconforming. Rainbow Rascals day care center, the previous use in the present case, had obtained a variance, and was therefore a permitted use, not a nonconforming use. The ZBA had no discretion to allow a substituted nonconforming use because the previous use was not nonconforming. Because the ZBA's decision denying the requested substituted nonconforming use was not discretionary, it was not an individualized assessment and cannot constitute a basis for applying the RLUIPA to the present case.

Even if the facts alleged in its complaint (aside from conclusory assertions of law) are assumed to be true, the RLUIPA does not apply to the present case. Plaintiff has failed to state a claim that the RLUIPA

applies and defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) is granted as to this claim. In addition, plaintiff has not produced evidence to support each element of its claim, and summary disposition is also appropriate under MCR 2.116(C)(10).

B. *COUNT II: plaintiff's appeal from ZBA decision*

A ZBA decision must be affirmed unless it is (1) contrary to law, (2) based on improper procedure, (3) not supported by competent, material and substantial evidence on the record or (4) an abuse of discretion. *Reenders v. Parker*, 217 Mich.App 373, 378 (1996), M.C.L. § 125.293a. A ZBA should not grant a use variance unless it can find, on the basis of substantial evidence, that the property *cannot reasonably be used* in a manner consistent with existing zoning. *Puritan-Greenfield Improvement Ass'n v Leo*, 7 Mich.App 659, 673 (1967), *Farah v. Sachs*, 10 Mich.App 198, 203 (1968), *Sun Oil Co v. Madison Heights*, 41 Mich App 47, 55 (1972).

Defendant argues that because plaintiff failed to demonstrate at the ZBA hearing that the property had no viable economic use without the variance, the ZBA's decision not to grant the variance was correct. In addition, defendant contends, the ZBA correctly determined that plaintiff's proposed primary school would be a *non-conforming* use; that the previous use (Rainbow Rascals) was a *conforming* use; and that plaintiff's use therefore could not be a *substituted non-conforming* use. The ZBA was correct, so this appeal should be denied.

Plaintiff argues that the ZBA denial of plaintiff's application for a use variance was contrary to law, namely, contrary to plaintiff's First Amendment right to free exercise and to the RLUIPA. In addition, plaintiff argues that the ZBA decision was not supported by competent, material and substantial evidence on the record: there were no objections to the proposed use from citizens, the proposed use is less intense than the previous use, and the proposed use raises no traffic, parking, health or safety concerns. There was no reason not to grant the variance, plaintiff contends, so the ZBA decision was unsupported and must be overturned.

Plaintiff also argues that the ZBA's decision denying the substitution of a non-conforming use was wrong. The Zoning Ordinance allows a proposed nonconforming use to be substituted for a previous nonconforming use upon permission of the ZBA, provided that no structural alterations are made and the proposed nonconforming use "is more appropriate than the existing nonconforming use in the district in which it is located." Zoning Ordinance § 130.2308. The previous use was a day care with up to 100 children allowed; the proposed use-a school with a maximum of 25 children-is, according to plaintiff, more appropriate than the previous use and requires no structural alteration. Thus, the ZBA should have granted the substituted nonconforming use and should be reversed.

Under the Township's Zoning Ordinance, OP districts are intended, *inter alia*, to permit offices in a campus environment; to permit development in a planned, coordinated manner according to an overall development plan for the district; and to encourage preservation of open space and natural features in

office parks. In addition, the OP district is intended "to permit and encourage uses that support and complement the principal uses that are permitted in this district, or are vital to such uses and must be located close to them." Zoning Ordinance § 130.1006(A). OP districts, like PUDs, are very site-specific and plan-specific-the particular OP is a planned whole, not simply an area of separate uses of the same type all side by side. Thus, the site plan for an office park/OP district becomes part of the Zoning Ordinance itself, and any changes in use within the district must proceed by amending the ordinance:

> 130.1006 Office Park District (OP).
>
> * * *
>
> B. *Location of an OP district.* An OP district shall be located in areas of Ann Arbor Township that are designated in the Township's adopted General Development Plan for office uses. A petition for an OP district in all other locations shall either follow, or proceed simultaneously with, an amendment to the adopted General Development Plan.
>
> C. *Permitted uses.* Uses in an OP district shall be limited to those uses that are identified on the approved area plan, approved preliminary site, or approved final site plan, whichever is applicable. No other uses shall be permitted in the OP district unless the applicable plans are amended in accordance with this ordinance. Uses that will be permitted in an office park shall be selected from the following list.

1. Permitted principal uses....

2. Permitted accessory uses....

d. Day care facilities for children of employees in the office park only.

Zoning Ordinance § 130.1006.

It is clear that the proposed use-a primary school-is not a permitted use in an OP and the ZBA finding in that regard was correct. The ZBA was also correct to deny the requested variance because, as defendant argues, the plaintiff did not make the showing necessary for a use variance, *i.e.*, that the property could not reasonably be used in a manner consistent with the existing zoning. When considering a request for a use variance, the question the ZBA must decide first is not whether the proposed non-conforming use is appropriate for the property or whether the petitioner has a special need for that particular property, but whether the property could reasonably be used for any of the uses expressly permitted in that district. The ZBA may not reach the question whether the proposed non-conforming use could be appropriate for the property until it decides that the property *cannot* reasonably be used in a manner consistent with the present zoning. The evidence plaintiff now points to-which is really an absence of evidence (no objections from citizens, no evidence of safety, traffic or parking concerns, etc.)-is simply not relevant to this determination.

Plaintiff's argument that the proposed nonconforming use-a 25 student K-3 school-would be a more appropriate use than the previous

nonconforming use-a 100 child day care-depends on its unsupported assumption that Rainbow Rascals was a *nonconforming* use. The ZBA, however, correctly found Rainbow Rascals to be a conforming use because once the ZBA granted Rainbow Rascals a variance, the nonconforming use became conforming. *See* Minutes of the ZBA Meeting, June 28, 2000, at p 3 (comments of Ms. Laporte).

The burden is on plaintiff to show that the ZBA decision was contrary to law and/or not supported by competent, material, substantial evidence on the record. Plaintiff has not met that burden. First, plaintiff asserts that the ZBA decision violated plaintiff's First Amendment rights and/or the RLUIPA. As discussed above, the RLUIPA does not apply here, and plaintiff has failed to allege or offer evidence to support a claim that defendants have violated plaintiff's First Amendment right to free exercise or free speech.

Second, plaintiff's argument that the ZBA decision was not supported by competent, material and substantial evidence on the record demonstrates plaintiff's misconception of the burden of proof and the standard the ZBA must apply when considering a request for a variance or substituted nonconforming use. Plaintiff's view is that once the plaintiff alleges error on the part of the ZBA, the ZBA must produce evidence that its decision was correct; and, furthermore, that if the proposed use is less intense than the previous, then the ZBA *could* grant the

request and it therefore *must* grant the request.[3] The ZBA, however, when considering a request for a variance or substituted nonconforming use, must consider whether there are possible, appropriate *conforming* uses, *i.e.*, whether the petitioner has shown that the proposed nonconforming use is the only viable use that can be made of the property. Plaintiff did not make that showing to the ZBA at the hearing, and still has not made it. The ZBA, however, when considering a request for a variance or substituted nonconforming use, must consider whether there are possible, appropriate, *conforming* uses, *i.e.*, whether the petitioner has shown that the proposed nonconforming use is the only viable use that can be made of the property. Plaintiff did not make that showing to the ZBA at the hearing, and still has not made it.

In conclusion, this Court affirms the decision of the ZBA and finds that it was legally correct and based on competent, material, substantial evidence on the record. *Carleton Sportsman's Club v. Exeter Twp*, 217 Mich.App 195 (1996).[4]

---

[3] Plaintiff may be confused as to the scope of the RLUIPA, which attempts to shift the burden of proof to the government to justify the governmental action that burdens free exercise in those cases to which it applies. The RLUIPA does not, despite plaintiff's optimism, shift the burden of proof in non-RLUIPA claims of ZBA appeals under state law.

[4] It should be noted that a claim of appeal from a ZBA decision is not properly decided using the standards for a motion for summary disposition. See *Carleton Sportsman's Club v. Exeter Twp*, 217 Mich.App 195, 201-02 (1996) (the trial court erred when it decided the case on the parties' motions for summary disposition, using the standards for summary disposition under

C. *COUNT III: substantive due process and equal protection*

1. Substantive due process

Defendants argue that to prevail on a claim of violation of substantive due process, plaintiff must establish that the challenged zoning classification advances no reasonable governmental interest, *Bell River Associates v. China Charter Twp,* 223 Mich.App 124, 129 (1997), and/or that the Ordinance imposes an arbitrary or unreasonable restriction on the use of the property, *id* at 129-30. Plaintiff bears a heavy burden of proof to overcome the presumption of validity to which the Ordinance is entitled. *Kropf v. City of Sterling Heights,* 391 Mich. 139, 162 (1974). Defendants contend that plaintiff has failed to demonstrate that the Ordinance is arbitrary and unreasonable.

Plaintiff responds that the Ordinance, to meet substantive due process requirements, must bear a real and substantial relationship to public health, safety and welfare, *Macenas v. Village of Michiana,* 433 Mich. 380 (1989), *Long v. City of Highland Park,* 329 Mich. 146, 151 (1950), and cannot constitute an unreasonable restriction on land use, *Long, supra.* Plaintiff argues that the ZBA "has no evidence or

---

MCR 2.116(C)(8) and 2.116(C)(10), rather than deciding whether the decision was supported by competent, material and substantive evidence on the record and authorized by law). The parties here, however, have addressed the correct standard for deciding an appeal, and the Court therefore has construed their arguments as arguments on appeal rather than on summary disposition.

record that the Plaintiff's proposed use poses a health, safety, or welfare concern" and that the prevention of the use-religious education-harms the community, since education and religion are to be favored and promoted, *People v. DeJonge,* 442 Mich. 266 (1993). The ZBA decision, according to plaintiff, was unreasonable on its face.

Plaintiff again has misunderstood the burden of proof. Whether the appropriate test is rational relationship or strict scrutiny, the burden is on plaintiff to show that the ordinance does not bear a relationship (rational or narrowly tailored) to a governmental purpose (legitimate or compelling). Plaintiff has failed to allege or to produce any evidence showing that the ordinance bears no rational relationship to its purpose, or that it imposes an arbitrary or unreasonable restriction on land use, either on its face or as applied. Plaintiff has failed to state a claim of substantive due process and has failed to demonstrate the existence of a genuine issue of material fact in dispute with regard to this claim. Defendants' motion for summary disposition is granted pursuant to MCR 2.116(C)(8) and 2.116(C)(10).

2. Equal protection

According to defendants, citing *Mount Elliott Cemetery Ass'n v. City of Troy,* 171 F3d 398, 406 (1999), to prevail on an equal protection claim, plaintiff must allege and prove that it was treated differently than a similarly situated person because of plaintiff's religion. Defendants state that plaintiff has not made such allegations and, even if it had, could not support such allegations with evidence.

Plaintiff argues that strict scrutiny is the appropriate standard of review for this claim. Defendants, plaintiff asserts, provide no evidence of a compelling governmental interest that bears a rational relationship to the zoning ordinance that prevents plaintiff's use, nor evidence as to why plaintiff's proposed use should be denied. The previously allowed nonconforming use was much heavier than plaintiff's proposed use. Plaintiff contends that, at the hearing, the ZBA "focused" on plaintiff's religious affiliation, and infers that the ZBA's "arbitrary and inconsistent decision" was based on religious discrimination.

Plaintiff points to the portion of the ZBA meeting minutes in which Ms. Laporte questioned Attorney Davis about his statements, in his initial presentation, about the Constitution and religious freedom, and as to whether petitioner believed it has rights it would not have as a non-religious school. Plaintiff believes these questions by Ms. Laporte are evidence of discrimination against plaintiff on the basis of religion. A review of the complete minutes shows, however, that petitioner's representatives raised the issue of religion first and emphasized it heavily in their statements to the ZBA. That Ms. Laporte asked follow-up questions on a subject petitioner clearly regarded as central to the application cannot reasonably be construed as religious discrimination in the absence of any other evidence to that effect. In addition, section 130.2411 of the Township Zoning Ordinance requires the ZBA to find, as part of the standard for determining whether to grant a variance, "granting the variance requested will not confer on the applicant any special privilege that is denied by this Ordinance to other lands, structures, or buildings in the same district." Ms.

Laporte's question was a legitimate inquiry related to this standard.

Again, plaintiff's argument misses the point. Whether or not strict scrutiny is the correct standard of review, defendants are correct that, to state a claim for equal protection, plaintiff must allege and prove that it was treated differently than a similarly situated person or entity because of plaintiff's religion. Plaintiff has failed to allege or produce any evidence that it was treated differently from any other entity, and its equal protection claim fails. MCR 2.116(C)(8), 2.116(C)(10).

D. *COUNT IV: "void for vagueness"*

A statute/ordinance is void for vagueness if (1) it is overbroad, (2) it does not provide fair notice of what conduct is proscribed or (3) it is so indefinite that it effectively gives the officials enforcing it unlimited discretion. *Grayned v. City of Rockford*, 408 U.S. 104; 92 S Ct 2294 (1972), *Independence Twp v. Murdoch*, 155 Mich.App 770, 774-75 (1986). Defendant argues that the zoning ordinance clearly defines permitted principal uses and accessory uses in OP districts, and does not give unlimited discretion to Township officials to determine whether a land use will be permitted. Plaintiff argues that defendant's ordinance is void because it allows arbitrary enforcement, such as approving a 100 child day care but not a 25 child school, and infringes plaintiff's right to free exercise.

Plaintiff has failed to show that the ZBA's enforcement of the ordinance was arbitrary, much less that the ordinance is vague in any way. The ordinance is clearly written and the standards for the ZBA's

decision, and for the Court's review of that decision, are clear and objective. That plaintiff was not satisfied with the ZBA's decision does not make the decision arbitrary. Plaintiff has failed to state a claim that the ordinance is void for vagueness or demonstrate the existence of a disputed issue of fact, and defendants' motion for summary disposition is granted as to this claim.

E. *COUNT V: petition for superintending control*

Under MCR 3.302(C) and *Choe v. Charter Twp of Flint*, 2000 WL 567578 (Mich.App 2000), an order of superintending control is not an appropriate remedy in a case where the plaintiff has the right to appeal the denial of a land use variance. Indeed, MCR 3.302(C) expressly states that if an appeal in the circuit court is available, that method of review must be used and the complaint for superintending control dismissed. Because an appeal is available in the present case (where plaintiff has asserted its claim of appeal from the ZBA decision), the plaintiff's claim requesting an order of superintending control must be dismissed. Defendants' motion for summary disposition is granted as to this claim.

F. *COUNT VI: procedural due process*

Plaintiff argues that because the ordinance is void for vagueness, it violates the due process clause as made applicable to the states through the 14th Amendment.

Plaintiff appears not to understand the difference between substantive and procedural due process. A zoning ordinance meets procedural due process

requirements if it provides notice and an opportunity to be heard. *Rental Property Owners Ass'n of Kent County v City of Grand Rapids*, 455 Mich. 246, 271-72 (1997). The Township's ordinance so provides and the procedural requirements of the ordinance were followed by the Township officials and ZBA in this case. Plaintiff's procedural due process claim fails under MCR 2.116(C)(8).

G. *COUNT VII: "unreasonable"*

Defendants argue that this claim is merely a restatement of plaintiff's defective substantive due process claim. Plaintiff does not appear to respond to this argument directly. The Court agrees with defendants, and grants defendants summary disposition as to this claim under MCR 2.116(C)(8).

III. *CONCLUSION*

For the reasons stated above, defendants' motion for summary disposition is granted; and plaintiff's motions for summary disposition and preliminary injunction are denied. Plaintiff's complaint is dismissed with prejudice.

IT IS SO ORDERED.

APPENDIX L

Michigan Supreme Court
Lansing, Michigan

Order Marilyn Kelly, Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway
Justices

FILED AUGUST 2, 2010
Rehearing 565

3 December 2009

137443

SC: 137443
COA: 272357
Washtenaw CC: 00-001072-AS

SHEPHERD MONTESSORI CENTER MILAN,

Plaintiff-Appellant,

v

ANN ARBOR CHARTER TOWNSHIP, ANN ARBOR CHARTER TOWNSHIP ZONING OFFICIAL, and ANN ARBOR CHARTER

TOWNSHIP ZONING BOARD OF APPEALS,)
)
Defendants-Appellees.)
)

In this cause a motion for rehearing is considered and it is DENIED.

[SEAL]

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 2, 2010 /s/ Corbin A. Davis
Clerk

APPENDIX M

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such

male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX N

[*Logo omitted*] Domino's Farms Office Park, LLC

24 Frank Lloyd Wright Drive
P.O. Box 445
Ann Arbor, MI 48106

Ann Arbor Charter Township

In re: ZBA 3-00, Shepard Montessori School's use of 24 Frank Lloyd Drive, Office Park, Lobby B, Phase III, Level 1, 1901 sq. ft., per description attached, Exhibit One.

Dear ZBA Officials:

Please be advised that Naomi Corera is authorized to appeal and seek variances on our behalf regarding the above described property and occupy and use the above described property as a Shepherd Montessori School and as described in Mr. Dresselhouses's letter of May 1, 2000 denying the use.

/s/ Paul R. Roney
Paul R. Roney, President
Domino's Farms Office Park, LLC

/s/ S[illegible] D[illegible
Witness

/s/ S[illegible] L[illegible]
Witness [RECEIVED JUN 02 2000]

MAP
Proposed Shepherd Montessori School
Domino's Farms, Ann Arbor Township
Uppgren + Associates Architects 4-7-00

[*Fold-Out Exhibit, see next page*]

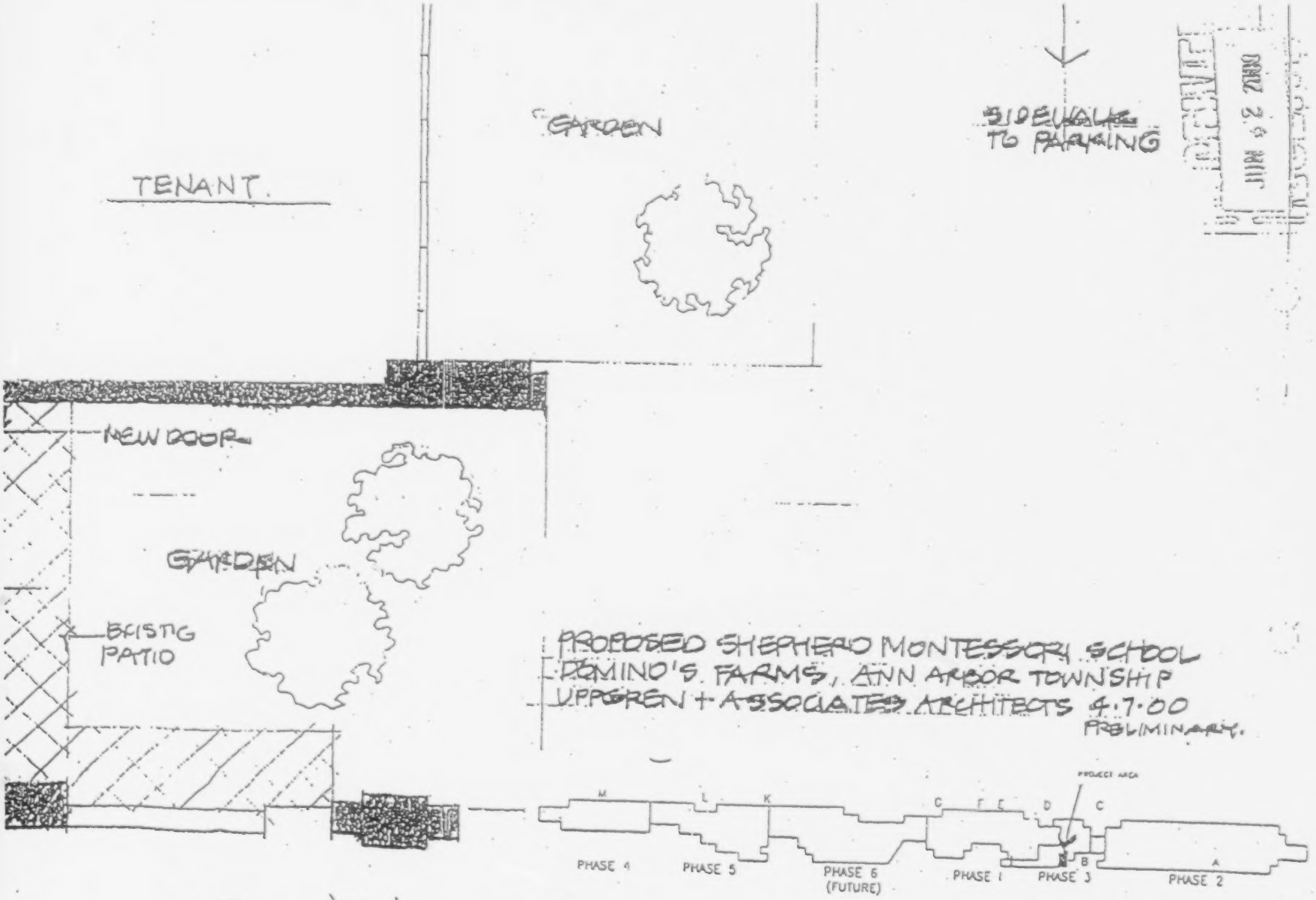

GARDEN
SIDEWALK TO PARKING
TENANT
NEW DOOR
GARDEN
EXISTG PATIO
PROPOSED SHEPHERD MONTESSORI SCHOOL
DOMINO'S FARMS, ANN ARBOR TOWNSHIP
UPPGREN + ASSOCIATES ARCHITECTS 4.7.00
PRELIMINARY.
PROJECT AREA
M
L
K
C
F
E
D
C
B
A
PHASE 4
PHASE 5
PHASE 6 (FUTURE)
PHASE 1
PHASE 3
PHASE 2
KEY PLAN

EXHIBIT ONE

APPENDIX O

ANN ARBOR CHARTER TOWNSHIP
3792 PONTIAC TRAIL
ANN ARBOR MI 48105 734-663-341

Received From: SHEPHERD MONTESSORI CENTE
Date: 05/30/00 Time: 2:58pm
Receipt Number: GEN \00013797
Clerk Code: MARCIEC

ITEM	REFERENCE	AMOUNT
FS	ZBA-3-00	
	ZONING BOARD	350.00
	Total:	350.00
Check		350.00
	Change:	.00

Naomi Corera
File Name

ZBA-3-00
File Number

ACKNOWLEDGEMENT OF ADDITIONAL FEES/EXPENSES

I/WE do hereby acknowledge and understand that we are responsible for any and all fees/expenses incurred in the above project which are above and beyond the initial fee which has been paid in the amount of $350.00.

These fees and expenses can be incurred for such things as Engineering, Planner, Planning, and Lawyer fees which are incurred by the Ann Arbor Charter Township in the handling of your project.

/s/ Robert Davis
Signature of Applicant/Agent/Owner

Signature of Applicant/Agent/Owner

5-30-2000
Date

Witness:
/s/ Marcie Sca[illegible]

****NOTE: IT IS THE APPLICANT/AGENT'S RESPONSIBILITY TO INFORM THE OWNER OF THEIR RESPONSIBILITY TO PAY ANY ADDITIONAL FEE/EXPENSES INCURRED ABOVE AND BEYOND THEIR INITIAL PAYMENTS.**

REVISED 03/2000

ZBA# 3-00 DATE FILED Naomi Corera

rec'd 5-20-00

ANN ARBOR CHARTER TOWNSHIP
3792 Pontiac Trail
Ann Arbor, MI 48105
734-663-3418

ZONING BOARD OF APPEALS APPLICATION FOR VARIANCE

State of Michigan, Township of Ann Arbor, before the Zoning Board of Appeals, from the provisions of Article XXIV, Section 24.04 A-D, 24.08, 24.09, 24.10, 24.11, 23.08 C, of the Ann Arbor Charter Township Zoning Ordinance.

I, Naomi Corera state under oath the following facts:

Petitioner:

Naomi Corera
Name

24 Frank Lloyd Wright Drive
P.O. Box 534
Address

Ann Arbor, Mi 48106
City, State, Zip

1-734-930-3600
Telephone

Owner:

Domino's Farms Office Park, L.L.C.
Name

24 Frank Lloyd Wright Drive
Ann Arbor, Mich 48106
Address

City, State, Zip

1-734-930-3600
Telephone

Address of subject property: 24 Frank Lloyd Wright Drive, Ann Arbor 48106-0373

Tax ID# I-09-13-200-018

Current Zoning Office Park (OP)

Use of Property Office Park. Petitioner seeks to use vacant child care space for religious Shepherd Montessori, up to Grade 3.

Petitioners' status with respect to the property (i.e., Owner, Mortgager, Land Contract Purchase, etc.) Tenant with landowner authorization to appeal. (See attached)

Date the Petitioner acquired said interest in property May 23, 2000

Attach a site plan showing what the petitioner wishes to do with the property, along with photographs, building floor plans, etc. State proposed use of property and indicate the size and type of changes. (See attached)

The variance cannot be granted unless each of the following questions are answered in a manner satisfactory to the Zoning Board of Appeals.

1. Are the hardships or practical difficulties in the use of your property exceptional and peculiar to your property? Why?

   The current space for Shepherd Montessori is in full use and expansion to the vacant space accross the hall is requested for up to 25 students, up to Grade 3.

2. Do the hardships and practical difficulties supporting the variance include substantially more than mere inconvenience, inability to attain a higher financial return, or both? Why?

   The current space is limited in size. The vacant space previously accommodated a child learning center, Rainbow Rascals. Authorization is allowed under Sec. 23.08C.

3. What effect will granting the variance have on the property of others which surrounds your property?

   The proposed use of the vacant space is less intensive with less density than the prior use. All surrounding uses concur. There are no parking or traffic concerns.

4. What physical characteristics of your property-size, shape, location or topography- prevent you from using it in a way that is consistent with the ordinance?

The Shepherd Montessori is well established in its present location. The vacant space use will maintain consistency in location as a natural extension of the Montessori.

5. Is there any other property in your neighborhood that has the same or similar conditions? If so, please identify by street address.

   None identified to date.

6. Attach a letter of authority, or power of attorney, in case the appeal is made by a person other than the actual owner of the property.

   See attached.

I hereby say that all of the aforementioned statements, and the statements contained in the papers submitted herewith, are true and correct.

/s/ Naomi Corera
Petitioner's signature

Naomi Corera — May 30, 2000
Petitioner's name - please print — Date

Subscribed and sworn before me this
30 Day of May, 2000

[Notary Stamp]

Notary Public /s/ Danielle T. Boote

Acting in
County Washtenaw My Commission Expires 10/29/03

****

Application accepted by _____

Submittal:

___ Original Petition and Exhibits

___ Five copies of above

Date of Zoning Board of Appeals Meeting _____

ZBA Action ___ Approved
___ Approved, with conditions - attached hereto.
___ Denied

c:\data\word6\zoning\variance

PETITIONER: Naomi Corera
Shepherd Montessori Center

ZBA No.: _____

Date Filed: May 30, 2000

_____/

(1) The Petitioner seeks any and all variances necessary to occupy and operate vacant space at 24 Frank Lloyd Wright Drive, Ann Arbor, Michigan 48106-0373, for the continued purposes of the Shepherd Montessori Center currently operating at 24 Frank Lloyd Wright Drive, Ann Arbor, Michigan 48106-0373. The requested use will be to facilitate twenty-five (25) students up to Grade 3 in the Shepherd Montessori Center. The proposed use will be less intensive than the prior approved use of a child learning center, involving less parking and less traffic. The use is for a religious (Catholic) based curriculum/education, a preferred education and religious use.

There is no impact on the current structure or traffic flow/pattern.

(2) The Petitioner seeks an appeal of the Zoning Official's determination dated May 1, 2000 which is attached hereto. There is no basis under the Ordinance provisions, as written, to restrict or prohibit this proposed use and the Petitioner seeks a reversal of the May 1, 2000 zoning determination so as to allow the use as

proposed. The Petitioner's proposed use is consistent with the Ordinance in that it is an encouraged and favored use which wholly supports and complements the principal permitted uses for the OP zoning district. The proposed use will be within the buildings/structures containing an otherwise principal permitted use. The OP zoning district does allow for schools.

(3) The Petitioner seeks relief under Section 23.08 C. to allow for this use as proposed.

(4) The Petitioner seeks other relief within the discretion of the ZBA given the circumstances presented herein.

(5) The Petitioner respectfully requests a hearing as otherwise permitted under the Ordinances.

/s/ Naomi Corera
Naomi Corera

C:\My Documents\Domino\Shepherd Petition.doc

ANN ARBOR CHARTER TOWNSHIP
3792 PONTIAC TRAIL
ANN ARBOR, MICHIGAN 48105-9656
PHONE (734) 663-3418
FAX (734) 663-6678

[*Letterhead names omitted*]

May 1, 2000

Domino's Farms
Box 445
Ann Arbor, MI 48106
Attn: Van Belanger

Dear Van:

In reply to your request for permission to locate a K-3 year grade school in the office park zoning, it would not be allowed by the present zoning.

Under permitted uses in Sec. 130.1006(C)(1) primary and secondary schools are not listed as a permitted use.

Day care facilities are listed in Sec. 130.1006(C)(2) as an accessory use. Please refer to definitions in Sec. 130.202 under school primary, which should clear the difference between day care and schools primary.

Any further questions, please feel free to contact me.

Sincerely,

/s/ Gary Dresselhouse
Gary Dresselhouse
Ann Arbor Township Zoning Official

GD/kj

Domino's Farms Office Park, LLC

Authorization

This document hereby authorizes the appointment of Robert L. Bunting to prosecute on behalf of Domino's Farms Office Park, LLC and Shepherd Montessori Center – Milan the right of Shepherd Montessori Center – Milan to use a certain space within Domino's Farms Office Park LLC for Montessori classroom education of up to 25 children in grades 1-3.

/s/ Paul Roney
Paul Roney, President
May 23, 2000

Shepherd Montessori Center
(an association)

Authorization

This document hereby authorizes the appointment of Robert L. Bunting to prosecute on behalf of Shepherd Montessori Center – Milan and Domino's Farms Office Park, LLC, the right of Shepherd Montessori Center – Milan to use a certain space within Domino's Farms Office Park, LLC for Montessori classroom education of up to 25 children in grades 1-3.

/s/ Naomi Corera
Naomi Corera, President
May 23, 2000

APPENDIX P

130.1006 Office Park District (OP)

Sec. 10.06.

A. Intent. This district is intended to achieve the following objectives:

To permit offices in a low density, spacious, campus environment.

To permit and encourage uses that support and complement the principal uses that are permitted in this district, or are vital to such uses and must be located close to them.

To protect existing and future uses in the vicinity of this district from spillover effects that might be created by uses in this district.

To permit development in a planned, coordinated manner, according to an overall development plan for the district.

To provide facilities and services that are necessary for the health, safety, welfare, and convenience of employees, customers, and visitors in an office park.

To encourage provision of open space and preservation of natural features in an office park.

To help diversify the local economy, expand employment opportunities and expand the tax base of the Township.

B. Location of an OP district. An OP district shall be located in areas of Ann Arbor Township that are designated in the Township's adopted General Development Plan for office uses. A petition for an OP district in all other locations shall either follow, or proceed simultaneously with, an amendment to the General Development Plan.

C. Permitted uses. Uses in an OP district shall be limited to those uses that are identified on the approved area plan, approved preliminary site, or approved final site plan, whichever is applicable. No other uses shall be permitted in the OP district unless the applicable plans are amended in accordance with this chapter. Uses that will be permitted in an office park shall be selected from the following list:

1. Permitted principal uses.

   a. Administrative, business, professional and governmental offices.

   b. Uses listed as "Permitted Uses" in the A-1 district.

   c. Transmission and distribution lines, pipelines, and structures of public utility companies.

   d. Fire, police and ambulance stations.

   e. Medical and dental clinics.

2. Permitted accessory uses.

a. Recreation facilities, indoor and outdoor.

b. Service uses, such as barbershops, beauty shops, gift shops, dry cleaning and laundry pickup stations, wearing apparel sales and alterations, financial services, photographic services, and similar uses, intended primarily for patronage by employees in the office park but with a need for additional sales to the people not employed in the office park, shall be permitted, provided the uses are located entirely within buildings containing a principal use and their total floor area shall not exceed two percent of the total floor area existing in the office park with valid certificates of occupancy.

c. Living quarters for personnel employed on a farm located in an office park district.

d. Day care facilities for children of employees in the office park only.

e. Conference, seminar, and business training facilities.

f. Helicopter landing/take-off pads and related facilities.

g. Research and product development facilities.

h. Radio and television receiving and transmitting facilities.

I. Display facilities.

j. Food services, intended primarily for patronage by employees in the office park, shall be permitted without limitation on their total floor area, provided the uses are located entirely within buildings containing principal uses, and any such food service shall not be advertised or promoted in any way for patronage by persons not employed in the office park.

k. Operations and related buildings and structures required to maintain the grounds of an office park, or to maintain and support the permitted principal and accessory uses, such as maintenance shops, power plants, and storage buildings.

D. Density regulations. The following regulations shall apply to the entire land area within an office park, less any area within public street rights-of-way existing on the filing date of the petition to rezone the land to office park. Density regulations for individual lots shall be as shown on the area plan part of the approved office park zoning district.

1. The ground floor coverage (GFC) shall not exceed ten percent.

2. The floor area ratio (FAR) shall not exceed 0.10.

E. Minimum area requirements. The minimum area of land for initial designation in this district shall be 200 acres. Any parcel of land, regardless of area or dimension, may be added to the initial land if contiguous thereto and if the approved area plan is amended accordingly. The minimum area of a lot within this district shall be 5 acres.

F. Required yards.

1. A yard at least 75 feet wide shall be required along an existing or future public street right-of-way.

2. A yard at least 75 feet wide shall be provided along a perimeter of this district that does not abut a public street, except where the adjacent property is designated by the Township's general development plan for residential use, in which case the yard shall be at least 100 feet wide.

3. The following minimum yards shall be provided for each lot that is not subject to the yard requirements of subsections F-1 and F-2, preceding:

Front	75 feet
Side, interior	50 feet
Side, corner	75 feet
Rear	50 feet

For purposes of this section, a parcel of land that is described only for purposes of financing of building construction shall not be subject to these yard requirements, provided development of the parcel so described shall be consistent with the area plan part of the approved office park zoning district.

4. A building that is more than three floors or 35 feet high shall be set back from any lot line not less than the distances required in Section 10.06F-1 through F-3, preceding, or not less than the following distances, whichever result in the greater setbacks:

a. Not less than one foot for each foot of building height from a street line;

b. Not less that 1.5 feet for each foot of building height from an interior side or rear lot line.

5. Minimum yard requirements shall apply to all buildings and structures, drives, and parking and loading areas. Drives may cross required yards.

6. The preceding yard requirements, except those in subsections F-1, and F-4, may be reduced as part of the approved preliminary site plan. The reduction shall be based on findings that topographic conditions, existing trees or other vegetation, proposed land grading or plant materials, or other existing or proposed site conditions will perform the same function as the required yards.

7. All required yards shall be landscaped, and shall be adequately and regularly maintained. The yards required in subsection F-2, preceding, shall be developed and landscaped so as to function as a buffer between this district and abutting properties.

G. Distances between buildings. The permitted distances between buildings shall be as shown on the preliminary site plans, and shall be sufficient to meet fire regulations, and to provide for natural light, air circulation and solar access.

H. Height limits.

1. No building shall exceed a height of three floors or 35 feet unless a height exemption is approved by the Township Board as part of the area plan. The Planning Commission shall include a recommendation on the exemption in its report to the Township Board on the petition and area plan.

2. The exemption shall be based upon the following standards:

a. The building height shall be based on an overall design concept for the office park.

b. The building shall be properly related to the topography of the site and neighboring sites.

c. The building shall not interfere with natural light, air circulation, and solar access of neighboring buildings or properties; with views from neighboring buildings or properties; and with aircraft flight patterns.

d. Parking areas for the building shall be designed and landscaped with due consideration for the visual amenities of the site and the office park.

e. The building height and location shall have been reviewed by the Township Fire Chief and a report thereon supplied to the Planning Commission.

3. Not more than one building that exceeds three floors or 35 feet in height shall be permitted on a lot.

4. Height limit zones shall be shown on the area plan. The proposed height of each building shall be shown on the preliminary site plan and shall not exceed the height limit established in the approved area plan, including height exemptions approved under this section.

I. Parking and loading requirements. Parking and loading facilities shall be provided in accordance with Article 12, herein, except that the size of parking spaces may be reduced to not less than 9 feet wide and 18 feet long, if approved as part of approval of the preliminary site plan. Notwithstanding requirements of Article 12, herein, the number of spaces required for office and accessory service uses shall only be based on the rate of one space for each 300 square feet of office floor area. The number of parking spaces for all other uses, including medical and dental clinics, shall be provided in the number required for such uses in Article 12. The number of parking and loading spaces required may be reduced by the Township Board, upon the petitioner's showing that the proposed number of spaces will be adequate and a recommendation from the Township Planning Commission, as part of the Board's approval of the rezoning petition. Parking spaces shall be provided only in surface parking lots or in underground structures; above ground parking structures shall not be permitted in an office park district. The total number of surface parking spaces provided shall not exceed a rate of one space for each 300 square feet of total floor area in the office park, but in no case shall surface parking be provided in

areas not shown for such use in the area plan part of the approved office park zoning district. Loading areas shall be screened from view from any street or property line.

J. Outdoor operations. The outdoor storage of vehicles, equipment, supplies, or products; outdoor repair; or outdoor display of goods, materials, products, equipment, or processes shall be prohibited. Trash and other waste materials shall be stored as provided in Section 11.03A herein, shall be screened from view from a street or adjacent lots, and shall not be located in a required yard.

K. Landscaping. Landscaping shall be provided in accordance with the approved final site plan for each lot. All parts of each lot not developed with buildings, drives, parking and loading areas, and similar improvements shall either be maintained in a natural state or shall be landscaped with grass or other ground cover, shrubbery, trees, bushes, vines, or other suitable plantings. Parking lots shall be landscaped so as to reduce heat and glare, to divide parking lots into smaller units, and to buffer adjacent areas, where necessary. All plantings shall be live and shall be properly and regularly maintained. Dead or dying materials shall be replaced in accordance with approved plans.

L. Signs. Signs shall comply with the regulations in Article 13, herein, except that the following regulations shall apply, notwithstanding the provisions in Article 13:

1. Sign setbacks shall not be less than one-half the required yards.

2. One freestanding identification sign for the office park shall be permitted along each public road frontage, including freeways, of the park. The area of each sign shall not exceed 80 square feet.

3. One freestanding identification sign, not more than 36 square feet in area, shall be permitted for each building, structure, or use area within the office park.

4. Outdoor advertising signs shall not be permitted in this district.

M. Procedures and general provisions. As set forth in Section 10.05N (RRA zoning district) of this zoning ordinance.

(Added: Ord. Of 2-3-84, 2-3-84; amended: Ord. No. 88-2, 7-11-88; Ord. Of 9-17-90, 9-17-90)

130.2306 Repairs and maintenance

Sec. 23.06 On any nonconforming structure or on any structure housing a nonconforming use, work may be done in any period of twelve (12) consecutive months on ordinary repairs or in repair or replacement of nonbearing walls, fixtures, wiring or plumbing to an extent not to exceed twenty-five percent (25%) of the then current replacement cost of the nonconforming structure or nonconforming portion of the structure, provided that the floor area or volume of such building or the number of families housed therein, or the size of such structure as it existed on the date of adoption or applicable amendments of this Ordinance shall not be increased.

If a nonconforming structure or a portion thereof, or any structure containing a nonconforming use, becomes physically unsafe or unlawful due to lack of repairs and maintenance, and is declared by any duly authorized official to be unsafe or unlawful by reason of physical condition, it shall not thereafter be restored, repaired, or rebuilt except in conformity with the regulations of the district in which it is located.

130.2307 Change of tenancy or ownership.

Sec. 23.07. There may be a change of tenancy, ownership or management of an existing nonconforming use, building, or structure.

130.2308 Expansion and substitution.

Sec. 23.08.

A. The Board of Appeals shall determine if a nonconforming structure may be enlarged, expanded, extended, or altered, and the conditions under which such improvements shall be made. The following provisions shall apply:

1. The reasons for a nonconformity shall be limited to minimum lot area, lot width, required yards, off-street loading and parking requirements, and transition strip and landscape strip requirements. In no case shall a building or a structure that is nonconforming because of lot coverage, floor area ratio, lot area per dwelling units, or height regulations be permitted to expand without removing the nonconformity, except as permitted under a variance.

2. The proposed uses of such buildings and structures shall be among those permitted in the district in which situated.

3. The proposed improvement shall conform to all requirements of the district in which situated.

4. The Board of Appeals shall determine the following in approving a request:

a. That the retention of the nonconforming building or structure is reasonably necessary for the proposed improvement or that

requiring removal of such building or structure would cause unnecessary hardship.

b. That the proposed improvement is reasonably necessary for the continuation of activities on the property.

c. That the enlarged or otherwise improved nonconforming building or structure will not adversely affect the public health, safety and welfare.

5. The Board of Appeals shall have authority to require modification of the nonconformity where such is reasonable, as a condition for approval. The Board of Appeals may attach other conditions for its approval that it deems necessary to protect the public health, safety and welfare.

6. All expansions permitted under this section shall meet all requirements of Article XXII, "Site Plan Review", herein.

B. A nonconforming structure shall not be substituted for, or replace, any conforming or nonconforming structure.

C. A nonconforming use of a structure may be substituted for another nonconforming use upon permission by the Board of Appeals, as set forth in Section 24.08, herein, provided that no structural alterations are made, and provided, further, that such other nonconforming use is more appropriate than the existing nonconforming use in the district

in which it is located. In permitting such change, the Board of Appeals may require conditions and safeguards in accordance with the provisions and intent of this Ordinance. A nonconforming use, when superseded by a more appropriate use, as provided in this subsection, shall not thereafter be resumed.

(Amended: Ord. Of 9-17-90, 9-17-90)

ARTICLE XXIV

130.2400 ZONING BOARD OF APPEALS

130.2401 Board established.

Sec. 21.01. A Zoning Board of Appeals, hereinafter referred to as "Board of Appeals," is hereby established, in accordance with the Act 184 of the Public Acts of 1943, as amended.

130.2402 Membership and terms.

Sec. 24.02. The Board of Appeals shall consist of five (5) members: the Chair of the Planning Commission, a member of the Township Board appointed by the Township Board, and three members selected and appointed by the Township Board from among the electors residing in the unincorporated area of the Township. The term of the member from the Township Board shall not exceed his/her term of office on the Township Board, and he/she shall be appointed on even-numbered years. The Chair of the Planning Commission shall be the Chair of the Board of Appeals and his/her term shall coincide with his/her term as Chair of the Planning Commission. The term of office for the remaining three members shall be three years. Members may be reappointed. No elected official of the Township nor any employee of the Township may serve simultaneously as one of the three remaining members of, or as an employee of the Board of Appeals.

The third member selected and appointed by the Township Board and already serving at the time of this amendment shall complete the remainder of the two (2) year term previously provided under this

Ordinance. The additional two (2) members necessary to constitute the first five (5) member Board of Appeals established by this amendment shall be appointed immediately after the effective date of this amendment. The length of the first term of the two additional members shall be set by resolution of the Township Board and may be for less than three (3) years to provide for staggered terms. After completion of the terms provided above, the term of each of the three remaining members shall be three (3) years.

(Amended: Ord. of 4-14-86, 4-14-86)

130-2403. General procedures of the Board of Appeals.

Sec. 24.03.

A. Rules. The Board of Appeals shall adopt rules and regulations to govern its procedures.

B. Votes. A concurring vote of a majority of the members of the Board of Appeals shall be necessary for any decision. The Board of Appeals shall not conduct business unless a majority of its members is present.

C. Representation. Any person may appear on his/her own behalf at a hearing or may be represented by an agent or attorney.

D. Time limit. The Board of Appeals shall decide upon all matters within a reasonable time. The decision of the Board of Appeals shall be in the form of a resolution containing a full record of its findings and determinations in each case.

E. Meetings. Meetings of the Board of Appeals shall be held at the call of the chair and at such other times as the Board in its rules of procedure may specify. All meetings of the Board of Appeals shall be open to the public. The Board shall maintain a record of its proceedings that shall be filed in the office of the Township Clerk and shall be a public record.

F. Oaths. The chairperson of the Board of Appeals, or in the chairperson's absence, the acting chairperson (who shall be the vice-chairperson if present), may administer oaths and compel the attendance of witnesses.

130.2404 Powers and duties of the Board of Appeals.

Sec. 24.04. The Board of Appeals shall perform its duties and exercise its powers as provided in Act 184 of the Public Acts of 1943, as amended, so that the objectives of this Ordinance shall be attained; the public health, safety and welfare served; and substantial justice done. The Board of Appeals shall hear and decide, as provided in this chapter:

A. Appeals of any administrative decision of any official or body on any requirement of this ordinance.

B. Dimensional variances pertaining to area, placement, height, setback or similar matters.

C. Expansion of nonconforming buildings or structures.

D. Substitution of nonconforming uses.

Notwithstanding the preceding, the Board of Appeals shall not hear and shall have no authority regarding any issue that involves a conditional use permit or a planned unit development. The Board of Appeals shall not alter or change the zoning district classification of any property, or make any change in the terms of this ordinance, and shall not take any action that would result in making a legislative change.

130.2405 Fees.

Sec. 24.05. A schedule of fees of the Board of Appeals shall be established by resolution of the Township Board, and shall be paid at the time of application.

130.2406 Hearings.

Sec. 24.06. The Board of Appeals shall hold a public hearing on each appeal for administrative review, and on each application for expansion of a nonconforming use, conditional use permit and variance. The Chair of the Board of Appeals shall fix a reasonable time and date for the hearing, said date not to exceed thirty (30) days from the filing date. The notice shall be provided in accordance with Section 21.05A, herein. If the notice is delivered by mail, an affidavit of mailing shall be filed with the Board of Appeals by the Township Clerk prior to the public hearing. Where the hearing, as determined by the Board of Appeals, concerns matters of general applicability in the Township and does not concern only the individual lots or parcels, such notice shall be given in a newspaper of general circulation in the Township.

130.2407 Expansion and substitution of nonconformities.

Sec. 24.07. The Board of Appeals shall hear and decide upon applications for expansion of nonconforming structures and substitution of one nonconforming use for another such use in accordance with the provisions of Section 23.08, herein. An application for such expansion or substitution shall be filed with the Township Clerk. The application shall consist of a complete application form and fee, and shall contain adequate information to assist the Board of Appeals in reaching a decision in accordance with Section 23.08, "Expansion and substitution" herein. The Clerk shall transmit the application and information to each member of the Board of Appeals within three (3) days of the filing date.

130.2408 Administrative review.

Sec. 24.08. The Board of Appeals shall hear and decide appeals from any order, requirement, decision, or determination made by the Zoning Inspector in the interpretation and enforcement of this Ordinance. The Board of Appeals shall interpret zoning district boundaries according to the provisions of Section 3.02. "Official Zoning Map" herein.

130.2409 Duties on matters of appeal.

Sec. 24.09. All questions concerning the application of the provisions of this Ordinance shall first be presented to the Zoning Inspector. Such questions shall be presented to the Board of Appeals only on appeal from the decisions of the Zoning Inspector.

Recourse from decisions of the Board of Appeals shall be to the courts as provided by law.

130.2410 Procedures.

Sec. 24.10.

A. Appeals concerning administrative review may be made within such time as prescribed by the Board of Appeals by general rule, by filing with the Zoning Inspector and the Board of Appeals a notice of appeal specifying the grounds thereof. The Zoning Inspector shall transmit to the Board of Appeals copies of all papers constituting the record upon which the action appealed from was taken, within seven (7) days of the filing date of the appeal. The appellant shall submit a clear description of the order, requirement, decision or determination for which appeal is made, and may be required by the Board of Appeals to submit additional information to clarify the appeal.

B. Appeals may be taken by any person aggrieved by a decision of the Zoning Inspector.

C. A fee shall be paid to the Township Clerk at the time of filing the notice of appeal and shall be deposited in the Township's General Fund.

D. An appeal stays all proceedings in furtherance of the action appealed from, unless the Zoning Inspector from whom the appeal is taken certifies to the Board of Appeals after the notice is filed with him/her that by reason of facts stated in the certificate, a stay would, in his or her opinion, cause imminent peril to life and property. In such case, proceedings shall not be stayed other than by

a restraining order which may be granted by the Board of Appeals or by a court of record on application, on notice to the Zoning Inspector from whom the appeal is taken, and on due cause shown.

E. The Board of Appeals may, so long as such action is in conformity with the terms of this Ordinance reverse or affirm, wholly or in part, or may modify the order, requirements, decision, or determination appealed from and may make such order, requirement, decision, or determination as ought to be made, and to that end shall have the powers of the public official from whom the appeal is taken.

130.2411 Variances.

Sec. 24.11.

A. Intent. The Board of Appeals shall have the power and duty to authorize in specific cases a relaxation of the provisions of this Ordinance through a variance as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of this chapter would result in unnecessary hardship or practical difficulty.

B. Filing. An application for a variance shall be filed by the owner of the lot in question with the Township Clerk. The application shall consist of a completed application form, fee, and the information required in this Section. The Township Clerk shall transmit the application and information to each member of the Board of Appeals within three (3) days of the filing date.

C. Information required. Each application for a variance shall contain the following information:

1. Legal description, address, and tax parcel number of subject lot.

2. Boundary survey, showing all property lines, dimensions, and bearings or angles, correlated with the legal description; all existing and proposed structures and uses on the premises, and dimensions of such structures and their dimensioned locations; lot area and all calculations necessary to show compliance with regulations of this chapter.

3. Name and address of applicant, property owner, interest of applicant in the property and signature of the property owner, if other than the applicant, concurring in the submittal of the application.

D. Standards of determination. A variance shall not be granted by the Board of Appeals unless and until all of the following conditions are met:

1. A written application for a variance is submitted, demonstrating:

a. That special conditions and circumstances exist which are peculiar to the land, structure, or building involved and which are not applicable to other lands, structures, or buildings in the same district.

b. That literal interpretation of the provisions of this chapter would deprive the

applicant of rights commonly enjoyed by other properties in the same district under the terms of this chapter.

c. That the special conditions and circumstances do not result from the actions of the applicant.

d. That granting the variance requested will not confer on the applicant any special privilege that is denied by this chapter to other lands, structures, or buildings in the same district.

2. Any nonconforming use of neighboring lands, structures, or buildings in the same district, any permitted or nonconforming uses of lands, structures, or buildings in other districts, or any nonconforming structures shall not be considered grounds for the issuance of a variance.

3. The Board of Appeals shall find that the requirements of Section 24.11, D-1, herein, have been satisfactorily met by the applicant.

4. The Board of Appeals shall further find that the reasons set forth in the application justify the granting of the variance, and that it is the minimum variance that will make possible the reasonable use of the land, building, or structure.

5. The Board of Appeals shall further find that the granting of the variance will be in harmony with the intent of this chapter, and will not be

injurious to the neighborhood, or otherwise detrimental to the public interest.

(Amended: Ord. Of 9-17-90, 9-17-90)

130.2412 Voiding of variance.

Sec. 24.12. Each variance granted under the provisions of this chapter shall become null and void unless the construction authorized by such variance has been commenced within one hundred eighty (180) days after the granting of such variance and pursued diligently to completion, or the occupancy of land or buildings authorized by such variance has taken place within one hundred eighty (180) days after the granting of such variance.

130.2413 Reapplication for variance.

Sec. 24.13. No application for a variance which has been denied wholly or in part by the Board of Appeals shall be resubmitted for a period of three hundred sixty-five (365) days from the date of such denial, except on grounds of new evidence or proof of changed conditions found by the Board of Appeals to be valid.

130.2414 Site plan requirements.

Sec. 24.14 If an application or appeal to the Board of Appeals requires site plan approval by the Planning Commission, the applicant or appellant shall first apply for preliminary site plan approval as set forth in Article XXII, "Site Plan Review," herein. The Planning Commission shall review such plan and shall determine the layout and other features required to obtain approval of such plan. The Planning

Commission shall then transmit the plan and the Commission's findings thereon to the Board of Appeals. The Board of Appeals shall, upon deciding on the application or appeal, return the plan and its decision thereon to the Planning Commission for Commission action on the preliminary site plan.

130.2415 Appeals to courts.

Sec. 24.15. Any decision of the Board of Appeals may be appealed through the courts, as provided in Act 184, P.A. 1943, as amended.

130.2416 Conditions of approval.

Sec. 24.16. The Board of Appeals may attach conditions to any affirmative decision, provided such conditions are in accordance with the requirements of this Ordinance and Act 184, P.A. 1943, as amended. Such conditions shall be consistent with procedures, requirements, standards, and policies of the Township Board, Township Planning Commission, and other Township agencies, where applicable. Violation of any condition imposed shall be deemed a violation of this Ordinance and punishable under Article XX, "Administration and Enforcement," herein.

APPENDIX Q

ANN ARBOR CHARTER TOWNSHIP
ZONING BOARD OF APPEALS
DECEMBER 3, 1991

The Ann Arbor Charter Township Zoning Board of appeals was called to order by Chairman Schriemer on Dec. 3, 1991 at 4:00 p.m. to consider Domino's Farms Holding Limited (ZBA-6-91) variance request of Section 10.06 C-2b. Present were Chairman Schriemer, Harvey Sanderson, William Dutil and Catherine Braun. Absent was Adele Laporte. Also present were Larry McGonigal of Domino's Farms and Gary Kendra of Wise & Marsac, P.C. attorney for Domino's.

Under this provision, child care facilities are a permitted use under office park zoning limited to employees of the office park. Domino's is requesting a variance to allow persons not employed at Domino's to use the child care facility.

Chairman Schriemer moved to grant a variance under the following conditions:

1) We find there is a need for day care in the community in general.

2) We find this is a reasonable use and does not interfere with public health, welfare and safety.

3) It meets the requirements of our zoning ordinance, Section 24.11 D-1.

4) The variance is subject to limitation of one contiguous facility for up to 100 children on the Domino's Site.

William Dutil supported and the motion carried.

Meeting adjourned at 4:40 p.m.

Respectfully Submitted,

/s/ Catherine A. Braun
Catherine A. Braun, Township Clerk

APPENDIX R

Rainbow Child Development - Programs



Kindergarten

Some of our schools offer full day private kindergarten. Your child will enjoy a small class size environment which enables them to excel in their developmental areas.

[*Image omitted*]

Our qualified teachers offer a comprehensive program that allows the children to have fun learning a variety of subjects like language, science, math, social studies, creative arts, and large motor activity. The literacy program helps each child develop both oral and written language experiences.

Your child will enjoy the classroom computers and equipment which allows them to explore and enhance the skills they're learning.

Rainbow Child Development - Programs



Philosophy

Rainbow Child Development Center's program has been developed to serve the needs of today's family. We answer the dilemma that many parents face...***where to find quality child care.***

[*Image omitted*]

As teachers and care givers, our goal is to achieve a sense of continuity between home and center. We believe it is important for children to maintain a familiar and comfortable routine. Through parent/teacher communication, we individualize each child's care and learning opportunities.

>>Learn More

Educational Programs

Rainbow child Development will introduce your child to the wonders of learning. We will help him or her explore the world of social and intellectual development, enabling them to gain self-esteem and confidence, while respecting each child as an important and unique person. Children have the opportunity to read, experience a foreign language, learn about mathematics, science, social studies,

health, computers, and other developmental areas. Along with parental support, our mutual goal is to equip each child with skills and an approach to learning that will be a positive and exciting guide for life.

Educational Overview

Infant Program

Toddlers

Preschool

PreKindergarten

Kindergarten

The Varsity Club

Summer Camp

Rainbow Child Development - About Us



Rainbow Child Development Centers' program has been developed to serve the needs of today's family. We answer the dilemma that many parents face...*where to find quality child care.*

[*Image omitted*]

As teachers and care givers, our goal is to achieve a sense of continuity between home and center. We believe it is important for children to maintain a familiar and comfortable routine. Through parent/teacher communication, we individualize each child's care and learning opportunities.

As a family oriented child development center, Rainbow Child Development assures a quality "home away from home." We provide an atmosphere where children are respected, staff are responsible, and parents are always welcome.

[*Image omitted*]

Our program enhances a child's development by offering a caring atmosphere combined with a structured curriculum.

We believe in helping children develop a positive self-image, sense of independence, and self-discipline

through success-oriented, developmentally appropriate activities.

Each individual child's needs are of utmost importance. We share with parents the belief that each child is a precious gift.

[Image omitted]

In addition, **ALL** of Rainbow Child Development Centers' facilities are state licensed. We strongly believe in operating above the state guidelines and model our operations in accordance to the National Association for the Education of Young Children (***NAEYC***).

APPENDIX S

ANN ARBOR CHARTER TOWNSHIP
3792 PONTIAC TRAIL
ANN ARBOR, MICHIGAN 48105-9656
PHONE (734) 663-3418
FAX (734) 663-6678

[*Letterhead names omitted*]

May 1, 2000

Domino's Farms
Box 445
Ann Arbor, MI 48106
Attn: Van Belanger

Dear Van:

In reply to you request for permission to locate a K-3 year grade school in the office park zoning, it would not be allowed by the present zoning.

Under permitted uses in Sec. 130.1006(C)(1) primary and secondary schools are not listed as a permitted use.

Day care facilities are listed in Sec. 130.1006(C)(2) as an accessory use. Please refer to definitions in Sec. 130.202 under school primary, which should clear the difference between day care and schools primary.

Any further questions, please feel free to contact me.

Sincerely,

/s/ Gary Dresselhouse
Gary Dresselhouse
Ann Arbor Township Zoning Official

GD/kj [COPY]

APPENDIX T

EXHIBIT

ANN ARBOR CHARTER TOWNSHIP
3792 PONTIAC TRAIL
ANN ARBOR, MI 48105
(734) 663-3418 PHONE
(734) 663-6678 FAX

DATE: 10-26-00 TIME: _____

TO: Wm. Listman

COMPANY: _____

FAX#: 810-466-3668

FROM: Kay ANN ARBOR CHARTER TOWNSHIP

MESSAGE:

June 28 Zoning Board
approved minutes.

THIS TRANSMISSION CONSISTS OF 6 PAGE (S), INCLUDING THIS TRANSMITTAL PAGE.

c:data/faxtrans.wpd

ANN ARBOR CHARTER TOWNSHIP
ZONING BOARD OF APPEALS
WEDNESDAY, JUNE 28, 2000

The regular monthly meeting of the Zoning Board of Appeals was called to order by Chairman Sloan at 3:08 p.m. at the Township Hall, 3792 Pontiac Trail, Ann Arbor, MI 48105.

Present: Chairman Herbert Sloan, Secretary Catherine Braun, Member Adele Laporte. Also present were Attorney Sandra Sorini, Zoning Official Gary Dresselhouse, and Supervisor Elizabeth Langford. Absent: Members William Dutil and Douglas Price.

Sloan opened the meeting by calling for approval of the minutes of May 24, 2000. Laporte moved and Braun supported for approval of the minutes as recorded. Motion carried.

There was no Old Business.

Sloan opened the Public Hearing on ZBA-3-00 appealing the Zoning Official's decision that operating a primary school (K-3) by Shepherd Montessori School was not a use authorized in the Office Park District and for any and all variances necessary to occupy a vacant child care space at Domino's Farms Office Park as a primary school.

Attorney Robert Davis made the presentation on behalf of Naomi Corera and Shepherd Montessori. The application was filed as of May 30, 2000 with the appropriate fees. The petitioner seeks in this application to use vacated space at 24 Frank Lloyd Wright Drive for a K-3 Montessori education program

as a religious and educational use under the Constitution. Davis presented a floor plan showing the current space operated by the petitioner. The new space requested for the use is the vacated space of Rainbow Rascals day care center and the space required by the applicant is approximately 44% of the total space previously used by Rainbow Rascals.

He went on to say that the space historically accommodated a learning center, it is in the OP zoning district as defined in ordinance in Sec. 10.02, H, 3 and the vacant space will accommodate the use both in terms of its physical size and its utilities. He stated that the petition does not seek to use the entire historical space. The request is for 25 students for uses up to grade three, for students both within and outside the office park, that the requested use is less intensive than the prior use by Rainbow Rascals in terms of students, cars, traffic, parking and space. The Rainbow Rascals at its last operating time had 45 children there and only 27 of those had a relationship to the office park employees.

Mr. Davis stated that Sec. 23.08, C allows the ZBA to substitute in the use now proposed under certain conditions and those conditions are generally 1) that no structural alterations will be made. He stated that in this case no structural alterations will be made and he produced an affidavit to that effect from the architect, and 2) that the use is more appropriate. He stated that is true here with less dense use, the less impact on the traffic than previously allowed for the Rainbow Rascals operation.

Mr Davis also stated that Sec. 24.04 allows the ZBA jurisdiction to hear an appeal from the Zoning

Administrator to grant some variances as necessary and under Sec. D, to substitute in a non-conforming use. He also stated that Sec. 24.07 allows the ZBA to hear and decide substitution of a non-conforming use. Sec. 24.08 allows the ZBA to hear and decide appeals from any zoning decision made by the Inspector when interpreting the ordinance. Sec. 24.10, A, allows the ZBA to hear and review any zoning decision and Sec. 24.10, B, allows the ZBA to hear any appeal of a decision of the zoning inspector and Sec. 24.11 gives the right to grant variances.

He summarized by saying that there was an ongoing use in the current space, the petitioner wants to substitute into the new space less than 50% of the prior use by the Rainbow Rascals and to continue the Shepherd Montessori education right across the hall in this new space wit no structural alteration and otherwise meeting the spirit and intent of the Ordinance.

Dresselhouse stated that the request for this use came before him and that he denied that request based on what the use is. The previous use of the space in question was a day care center or child care center as defined in the ordinance and the use that is being proposed is a primary school which is a facility (either public or private) certified by the State of Michigan which offers all or part of a kindergarten through 6th grade education. The child care center is a facility for the care of children, not the education of children. There are two different uses here. Dresselhouse stated that there is no continued use because the child care use is what was granted, not an educational facility which is a primary school. The child care center use was granted for a day care center, not as an

educational facility. This is the basis for denial of the petition. The petitioner's request is for a primary school as defined in the ordinance and is not a permitted use in the Office Park or the A-1 District.

Sloan asked for questions from the board. Laporte stated she had no questions for the Zoning Official. There were no other comments by the Board.

Sloan opened the meeting to comments from the public. Naomi Corera spoke to the board about the Montessori approach to education which she said is a unique form of education to help children with special needs, either at the lower end where they are having a hard time learning or at the upper end being too fast for the rest of the class. She said that her school is a catholic school where children believe in the Lord Jesus Christ and the reason for her school is to spread the catholic faith. Children with special needs have to be in a catholic environment in order to take care of their academic needs and this type of education is needed to help the children in a catholic environment and the parents are the ones who are asking for the school to continue so their children can continue to be in a catholic environment and have their needs met.

Laporte asked on what basis was the decision made to make the school K through 3rd grade. Corera responded that the parents wished it. She has only children through the age of five for the day care she has now. Laporte stated that she thought she heard that Corera has a kindergarten now. Corera replied that she does because they are 5 years old and she is licensed by the Social Services Department to keep the 5-year old children for day care. Laporte asked if she was running a kindergarten program as well and

Corera answered "yes". The day care is from two and a half up to six years old. That is what she has license for from the Department of Social Ser. .ces. She is not certified by the Department of Education as a primary school. When asked by Attorney Sorini, Corera stated that is what she wants, to be certified as a primary school in the proposed new space.

Mr. Davis spoke again stating that the petitioner is not seeking to continue the old day care use. The Townships definition of primary school is a little more regimented than the Montessori approach to education, which is somewhat different with unique schooling to unique students of different ages.

Laporte stated that it was her understanding that once a variance has been granted the use is no longer a non-confirming use. As a matter of face, it is a conditional use. Sorini state that the ZBA did grant a variance from the conditions in the Office Park for the accessory uses going from a day care facility for just Office Park employees to a day care facility for Office Park employees and others. This is a variance and not a non-conformity.

Sloan asked for any more comments from the public. Davis circulated an affidavit from the architect guaranteeing that there would be no structural alterations. Sloan closed the public hearing.

Laporte asked Attorney Davis about his initial presentation when he spoke about the Constitution and religious freedom. Laporte asked if the petitioner believed that she has some additional rights to the relief that she would not have as a non-sectarian

private school without a religious affiliation based on the Constitution.

Davis responded that he believes that the petitioner has rights afforded under the Constitution which do favor as a use education and religion. However, the petitioner is proceeding under Sec. 23.08, C of the Ordinance which allows for a substitution of use.

On further questioning from Laporte, Davis stated that the petitioner believes she has the rights afforded to her that start with the US Constitution and the Michigan Constitution as a property-owner tenant under the Township's zoning scheme. Davis stated that the Constitution has provisions that favor uses that promote education and religion.

Sloan called far a close of the public hearing and discussion by the board and legal counsel.

Attorney Sorini began by stating that the Zoning Board of Appeals is limited in its authority that it has under the Ordinance. The Ordinance says that the Board of Appeals shall not alter or change the zoning district classification of any property or make any change in the terms of the ordinance. It shall not take any action which will result in a legislative change. Sorini stated that Office Park District is very specific on permitted principal uses and permitted accessory uses and primary schools is not one of them. She stated that the proper approach would be for the petitioner to ask the Board of Trustees to amend the Office Park District to include primary schools in the Office Park District rather than coming to this body for a variance request or an expansion of a non-conforming use. The petitioner does have the right to

challenge the Zoning Official's decision, which they have done, but it seems that the proper way for this to be handled is through the Board of Trustees.

Laporte stated that she had no further comment but having sat on the ZBA for some 20 years and having had to consider similar problems, what is sought really needs a change in the ordinance, either a change in the zoning classification. She stated that this is a huge office complex and that the ZBA does not have the power to make the change. The ZBA did grant a variance to permit day care for children whose parents were not employed within the office park complex. That was one step away but this is a much further step away, to actually run a school rather than a day care. She stated that it has a different purpose and certainly a different function under the ordinance. She stated that she was a little surprised to hear that a kindergarten was already being run in the current space and did not believe that was what the Board ever envisioned on previous variances. She cannot see a way in which this fits in with the zoning scheme or what was intended by the accessory use of a day care. She stated that she does not support this.

Braun stated that she felt this should have gone to the Board of Trustees.

Sorini added that the Office Park District has been amended recently to take land out of the district so that it could be used for a church and for a school. It's not possible in this building to take the land out of the district but the alternate route is to ask that the ordinance be amended for the use change.

Laporte moved to deny the variance request for the reasons that she does not believe that the ZBA has the power to grant the variance, nor that what is requested is appropriate in the zoning district in which it would function.

Sorini interjected that the petitioner has asked for three avenues of relief

1) an appeal from the Zoning Officials determination.
2) a request for a variance for use of the space
3) a substitution of non-conforming use

Laporte amended her motion to uphold the decision of the Zoning Administrator, and to deny the request for the variance for the reasons that have emerged from the board's discussion and counsel's advice and to move the denial of the substitution of non-conforming use because the existing use is not a non-conforming use. Braun supported.

Sorini added that in the event that this is deemed a non-conforming use, the board should protect itself by declaring that it does not wish to expand or substitute use.

Laporte amended her motion to say that "should it be deemed to be non-conforming use, the Board exercises its discretion not to substitute the proposed non-conforming use for the existing alleged non-conforming use." Braun accepted the amendment and the motion carried 3-0.

Under public comment Attorney Bunting asked to have the tape of the proceedings saved.

Braun moved to adjourn, seconded by Laporte and the meeting adjourned at 3:40 p.m.

Recorded by

Elizabeth Langford

APPENDIX U

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WASHTENAW

Court Case No. 00-1072-AS
Hon. Melinda Morris

[Filed May 17, 2005]

SHEPHERD MONTESSORI CENTER MILAN, a Michigan not for profit corporation,

Plaintiff,

v.

ANN ARBOR CHARTER TOWNSHIP, ANN ARBOR CHARTER TOWNSHIP ZONING OFFICIAL, and ANN ARBOR CHARTER TOWNSHIP ZONING BOARD OF APPEALS,

Defendants.

ROBERT L. BUNTING (P24212)
Attorney for Plaintiff
P.O. Box 7
Oxford, Michigan 48371
(248) 628-5150

ROBERT CHARLES DAVIS (P40155)
O'REILLY, RANCILIO, NITZ, ANDREWS,
TURNBULL & SCOTT, P.C.
Of Counsel/Co-Counsel for Plaintiff
148 Main, Suite 100
Mt. Clemens, Michigan 48043
(810) 466-3665

JAMES J. WALSH (P27454)
G. CHRISTOPHER BERNARD (P57939)
BODMAN LLP
110 Miller, Suite 300
Ann Arbor, Michigan 48104
(734) 761-3780
Attorneys for Defendants

DEFENDANTS' RESPONSE TO PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS

Defendants respond to plaintiff's first request for admissions as follows.

OBJECTIONS

1. Defendants object to definition No. 8 because the word "traffic" has multiple definitions. *Webster's Collegiate Dictionary, Tenth Edition*, has over 10 meanings for the noun "traffic."

2. Defendants object to definition No. 10 as so broad as to be meaningless. Applying the term "ordinance" as defined by plaintiff renders certain requests unduly burdensome, as it would require review of every ordinance of Ann Arbor Township.

3. Defendants object to definition No. 11 because the word "police" has multiple definitions. *Webster's Collegiate Dictionary, Tenth Edition*, has multiple meanings for the verb "police" and multiple meanings for the noun "police."

4. Defendants object to definition No. 12 because the word "parking" is not defined in *Webster's Collegiate Dictionary, Tenth Edition*. The transitive verb "park" has multiple meanings in that dictionary.

5. Defendants object to definition No. 13 because defendants have no knowledge if the Rainbow Rascal's day care program was "non-religious."

6. Defendants object to definition No. 14 because a party may not fashion a statement of law it perceives as favorable to its position under the guise of providing a definition.

REQUEST FOR ADMISSIONS

1. Please admit that the "property" is located in Defendants' Township.

ANSWER: Defendants admit that the "property" is located in Ann Arbor Township.

2. Please admit that the "property" includes an office building located at 24 Frank Lloyd Wright Drive, Ann Arbor, MI 48106.

ANSWER: Defendants admit that the plaintiff has defined the "property" to be an office building located at 24 Frank Lloyd Wright Drive, Ann Arbor, MI 48106.

3. Please admit that on May 30, 2000 Plaintiff filed with Defendants a Zoning Board of Appeals Application for Variance ("variance request").

ANSWER: Defendants admit that plaintiff filed a variance application on May 30, 2000.

4. Please admit the authenticity of the "variance request" attached as Exhibit 1.

ANSWER: Defendants admit that Exhibit 1 is a copy of plaintiff's variance request.

5. Please admit that the Plaintiff timely filed the "variance request" under the ordinance.

ANSWER: Defendants object to this request because the defined term "ordinance" is overly broad. In further response, the defendants state that they have not contested the timeliness of plaintiff's variance request.

6. Please admit that Plaintiff properly complied with all of Defendants' ordinance requirements for filing a "variance request."

ANSWER: Defendants object to request for admission No. 6 because the term "ordinance" is overly broad. In further response, defendants state that plaintiff's application was sufficiently complete to permit the zoning board of appeals to hear and decide the plaintiff's variance request.

7. Please admit that the "variance request" states that the requested use for the "property" was as a Catholic Montessori School, up to Grade 3.

ANSWER: Denied. The variance application makes no reference to "Catholic Montessori School" and the religious nature or orientation of a proposed use is irrelevant to a variance request.

8. Please admit that the Defendants made no finding on the record at the "variance hearing" indicating any parking concern related to the "variance request."

ANSWER: Defendants object to request for admission No. 8 because of its use of the term "parking concern." Defendants admit that the issue of motor vehicle parking was not discussed during the hearing on plaintiff's variance application.

9. Please admit that the Defendants made no finding on the record at the "variance hearing" indicating any police concern related to the "variance request."

ANSWER: Defendants object to request for admission No. 9 because of the use of the term "police concern."

10. Please admit that the Defendants made no finding on the record at the "variance hearing" indicating any public health concern related to the "variance request."

ANSWER: Defendants admit that there was no discussion of public health concerns at the hearing on plaintiff's variance.

11. Please admit that the Defendants made no finding on the record at the "variance hearing"

indicating any traffic concerns related to the "variance request."

ANSWER: Defendants object to request for admission No. 11 because of its use of the term "traffic concerns." Defendants admit that there was no discussion at the hearing on plaintiff's variance request regarding excessive motor vehicle traffic or like problems.

12. Please admit that the Defendants made no finding on the record at the "variance hearing" indicating any sewage concern related to the "variance request."

ANSWER: Defendants admit that there was no discussion of sewage at the hearing on plaintiff's variance request.

13. Please admit that the Defendants made no finding on the record at the "variance hearing" indicating any fire concern related to the "variance request."

ANSWER: Defendants admit that there was no discussion of any fire concern at the hearing on plaintiff's variance request.

14. Please admit that the Defendants denied the Plaintiff's "variance request."

ANSWER: Defendants admit that the zoning board of appeals denied the plaintiff's variance request.

15. Please admit that the Defendants denied the Plaintiff's "variance request" based upon the fact that the statement of specific use contained in the "variance

request" was for a Catholic Montesseri School up to Grade 3.

ANSWER: Defendants deny plaintiff's request for admission No. 15. In further response, defendants admit that a use variance to operate a primary school in an office park zoning district was denied.

16. Please admit that the Defendants applied its local zoning ordinance to deny Plaintiff's "variance request."

ANSWER: Defendants admit that the denial of plaintiff's variance request was in conformity with the standards for a variance found in the Ann Arbor Township zoning ordinance.

17. Please admit that at the "variance hearing" no citizen voiced any objection to the Plaintiff's "variance request."

ANSWER: Defendants admit that no citizen voiced an objection to plaintiff's variance request at the hearing on that request.

18. Please admit that to this date, Defendants have not received any written objection from any citizen related to Plaintiff's "variance request."

ANSWER: Defendants admit that they have not received any written objection to plaintiff's variance request.

19. Please admit that the Defendants did not receive any written objection from any citizen prior to

the "variance hearing" related to Plaintiff's "variance request."

ANSWER: Defendants admit that they did not receive any written objection to plaintiff's variance request prior to the hearing on that request.

20. Please admit that the Michigan Court of Appeals Opinion in this matter, dated November 6, 2003, is the law of the case in the matter.

ANSWER: Defendants object to request for admission No. 20 because it improperly calls for a legal conclusion.

21. Please admit that the Defendants cannot factually take actions which vidate "RLUIPA."

ANSWER: Defendants object to plaintiff's request for admission No. 21 because the term "factually" is not clear and its inclusion in this request appears to be a not very clever attempt to circumvent the prohibition requesting a legal conclusion. When the word "factually" is deleted from the request for admission, it is plain that the request improperly seeks a legal conclusion.

22. Please admit that "RLUIPA" factually provides that the Defendants cannot impose a land use regulation on the Plaintiff which imposes a substantial burden on the religious exercise of the Plaintiff absent a compelling governmental interest.

ANSWER: Defendants object to plaintiff's request for admission No. 22 because the term "factually" is not clear and its inclusion in this request appears to be a

not very clever attempt to circumvent the prohibition requesting a legal conclusion. When the word "factually" is deleted from the request for admission, it is plain that the request improperly seeks a legal conclusion.

23. Please admit that "RLUIPA" is to be factually construed in favor of a broad religious exercise.

ANSWER: Defendants object to plaintiff's request for admission No. 23 because the term "factually" is not clear and its inclusion in this request appears to be a not very clever attempt to circumvent the prohibition requesting a legal conclusion. When the word "factually" is deleted from the request for admission, it is plain that the request improperly seeks a legal conclusion.

24. Please admit that "RLUIPA" factually defines religious exercise to include any exercise of religion.

ANSWER: Defendants object to plaintiff's request for admission No. 24 because the term "factually" is not clear and its inclusion in this request appears to be a not very clever attempt to circumvent the prohibition requesting a legal conclusion. When the word "factually" is deleted from the request for admission, it is plain that the request improperly seeks a legal conclusion.

25. Please admit that "RLUIPA" defines a land use regulation to include a zoning or land marking law that limits or restricts the use or development of land.

ANSWER: Defendants object to request for admission No. 25 because it improperly calls for a legal conclusion.

26. Please admit that under the law of the case doctrine, the Plaintiff has met the jurisdictional basis for "RLUIPA" based on the facts set forth in the Plaintiff's Complaint in this matter.

ANSWER: Defendants object to request for admission No. 26 because it improperly calls for a legal conclusion. In further response, defendants admit that the Court of Appeals ruled that plaintiff's complaint satisfied the jurisdictional requirement under RLUIPA, 42 USC § 2000cc(a)(2)(C), by alleging an individualized assessment of plaintiff's proposed use of the property.

27. Please admit that pursuant to the law of the case doctrine, the Plaintiff has established a jurisdiction[illegible]is for triggering "RLUIPA" because the Defenda[illegible]ave factually made an individualized assessment of the Plaintiff's proposed use of the property.

ANSWER: Defendants object to plaintiff's request for admission No. 27 because the term "factually" is not clear and its inclusion in this request appears to be a not very clever attempt to circumvent the prohibition requesting a legal conclusion. When the word "factually" is deleted from the request for admission, it is plan that the request improperly seeks a legal conclusion. In further response, defendants admit that the Court of Appeals ruled that defendants made an individualized assessment of plaintiff's proposed use of the property.

28. Please admit that pursuant to the low of the case doctrine "RLUIPA" applies in this matter as set forth in the Plaintiff's Complaint.

ANSWER: Defendants object to request for admission No. 28 because it improperly calls for a legal conclusion.

29. Please admit that due to the law of the case doctrine, the Plaintiff factually has standing to maintain a cause of action under "RLUIPA."

ANSWER: Defendants object to plaintiff's request for admission No. 29 because the term "factually" is not clear and its inclusion in this request appears to be a not very clever attempt to circumvent the prohibition requesting a legal conclusion. When the word "factually" is deleted from the request for admission, it is plan that the request improperly seeks a legal conclusion.

30. Please admit that under the law of the case doctrine, the Plaintiff is factually protected party under "RLUIPA."

ANSWER: Defendants object to plaintiff's request for admission No. 30 because the term "factually" is not clear and its inclusion in this request appears to be a not very clever attempt to circumvent the prohibition requesting a legal conclusion. When the word "factually" is deleted from the request for admission, it is plan that the request improperly seeks a legal conclusion.

31. Please admit that the Plaintiff's proposed use, as factually presented in the complaint and at the

"variance hearing," of the "property" for a Catholic Montessori school, fits factually within "RLUIPA's" definition of a religious exercise.

ANSWER: Defendants object to plaintiff's request for admission No. 31 because the term "factually" is not clear and its inclusion in this request appears to be a not very clever attempt to circumvent the prohibition requesting a legal conclusion. When the word "factually" is deleted from the request for admission, it is plan that the request improperly seeks a legal conclusion.

32. Please admit that the Defendants made a factual determination of the Plaintiff's proposed property land use when the denied the Plaintiff's "variance request."

ANSWER: Defendants object to plaintiff's request for admission No. 32 because it does not make sense. Defendants do not know what the term "factual determination" means in the request.

33. Please admit that the Defendants had no other reason for denying the Plaintiff's "variance request" other than the Defendant's desire not to have the Plaintiff's proposed use.

ANSWER: Defendants deny request for admission No. 33.

34. Please admit that the Plaintiff has not been able to utilize the property for the purpose of a Catholic Montessori School as stated in their "variance request."

ANSWER: Defendants deny request for admission No. 34. Defendants believe plaintiff currently operates a Montessori program at the property. Defendants admit that plaintiff has not been able to operate a primary school at the property.

35. Please admit that the Plaintiff, from the date of its filing for a "variance request" and until April 2005, have been denied their proposed use contained in their "variance request" for the property.

ANSWER: Defendants admit request for admission No. 35.

36. Please admit that the harm suffered by the Plaintiff relates to their inability to use their property for a Catholic Montessori school is factually an ongoing harm.

ANSWER: Defendants object to request for admission No. 36 as seeking a legal conclusion. To the extent a response is required, defendants deny that plaintiff has suffered any harm.

37. Please admit that the denial of Plaintiff's "variance request" has imposed a substantial burden on the Plaintiff's religious exercise under "RLUIPA".

ANSWER: Defendants object to request for admission No. 37 as seeking a legal conclusion. To the extent a response is required, defendants deny that the denial of plaintiff's variance request has imposed a substantial burden on plaintiff's religious exercise.

38. Please admit that the property use described by the Plaintiff in its "variance request" is a property use which is protected by "RLUIPA".

ANSWER: Defendants object to request for admission No. 38 as seeking a legal conclusion. To the extent a response is required, defendants deny that the property use described in plaintiff's variance request is a property use which is protected.

39. Please admit that at the "variance hearing" the Defendants did not indicate on the record why the denial of Plaintiff's "variance request" furthered a compelling governmental interest.

ANSWER: Defendants admit request for admission No. 39, because the standard for a use variance under Michigan law does not require a consideration of whether the provision from which a variance is sought furthers a compelling governmental interest. Defendants further note that RLUIPA had not been enacted at the time of the hearing on plaintiff's variance request.

40. Please admit that at the "variance hearing" the Defendants did not indicate on the record why the denial of Plaintiff's "variance request" was the least restrictive means of furthering a compelling governmental interest.

ANSWER: See response to request for admission No. 39.

41. Please admit that the Defendant's denial of Plaintiff's "variance request" did not further a compelling governmental interest.

ANSWER: Defendants deny request for admission No. 41.

42. Please admit that the "property" is currently zoned "OP" office park district pursuant to the township zoning ordinance.

ANSWER: Defendants admit the request for admission No. 42.

43. Please admit that the Township's ordinance expressly permits the operation of day care centers within the OP district, but only for children of office park employees.

ANSWER: Defendants admit request for admission No. 43.

44. Please admit that in April 2000, the Plaintiff requested in writing a zoning determination from the Defendants regarding whether the Plaintiff's proposed use of the property would be allowed under the ordinance.

ANSWER: Defendants admit request for admission No. 44.

45. Please admit that by letter dated May 1, 2000 the Defendants' zoning official denied the Plaintiff's proposed use of the property.

ANSWER: Defendants deny request for admission No. 45. The zoning official explained that a primary school was not a permitted use in an OP district.

46. Please admit the authenticity of the May 1, 2000, letter attached as Exhibit 2.

ANSWER: Defendants admit request for admission No. 46.

47. Please admit that the Plaintiff's "variance request" anticipated that only up to 25 students would be attending the school.

ANSWER: Defendants deny request for admission No. 47. Defendants admit that the variance request mentioned "up to 25 students, up to Grade 3."

48. Please admit that the property was previously utilized by Rainbow Rascals with greater than 25 children allowed.

ANSWER: Defendants admit request for admission No. 48.

49. Please admit that Rainbow Rascals is a non-religious, pre-school day care program.

ANSWER: Defendants are not able to admit or deny request for admission No. 49. Defendants are not aware of whether Rainbow Rascals is "non-religious."

50. Please admit that the Defendants, on December 3, 1991, granted Rainbow Rascals a use variance which permitted an expanded use of the premises to allow children of non-office park employees to attend the Rainbow Rascals day care program.

ANSWER: Defendants admit request for admission No. 50.

51. Please admit that the Plaintiff's proposed use of the property is similar to Rainbow Rascals use of the property.

ANSWER: Defendants object to request for admission No. 51 as calling for a legal conclusion. To the extent a response is required, defendants deny that Plaintiff's proposed use of the property is similar to Rainbow Rascals' use.

Respectfully submitted,

BODMAN LLP

By: /s/ James J. Walsh
James J. Walsh (P27454)
110 Miller, Suite 300
Ann Arbor, MI 48104
(734) 461-3780
Attorneys for Defendants

May 17, 2005

* * *

[*Certificate of Service Omitted from Printing of this Appendix*]

Supreme Court, U.S.
FILED
NOV 30 2010
OFFICE OF THE CLERK

No. 10-573

In the Supreme Court of the United States

SHEPHERD MONTESSORI CENTER MILAN,
a Michigan not for profit corporation,
Petitioner,

v.

ANN ARBOR CHARTER TOWNSHIP, ANN ARBOR CHARTER TOWNSHIP ZONING OFFICIAL, and ANN ARBOR CHARTER TOWNSHIP ZONING BOARD OF APPEALS,
Respondents.

On Petition for Writ of Certiorari to the Michigan Supreme Court

BRIEF IN OPPOSITION

JAMES J. WALSH
Counsel of Record
BODMAN LLP
201 SOUTH DIVISION STREET, SUITE 400
ANN ARBOR, MICHIGAN 48104
(734) 761-3780
jwalsh@bodmanllp.com

Counsel for Respondents

November 30, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REASONS FOR DENYING THE PETITION 1

CONCLUSION 3

TABLE OF AUTHORITIES

Cases

Central State University v. American Ass'n of University Professors, Central State University Chapter,
526 U.S. 124 (1999) 3

City of Cleburne v. Cleburne Living Center, Inc.,
473 U.S. 432 (1985) 2

Statutes

Revised School Code,
Mich. Comp. Laws 380.1 *et seq.* 2

Child Care Organization Act,
Mich. Comp. Laws 722.11 *et seq.* 2

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to rule as a matter of law that a local government when enacting and enforcing zoning restrictions cannot distinguish between preschool daycare facilities and elementary schools without violating the constitutional guarantee of equal protection. The equal protection clause cannot be stretched that far.

Petitioner overlooks the equal treatment it received when it sought the same zoning variance as Rainbow Rascals. The Michigan Supreme Court wrote:

> Historically, both Rainbow Rascals and plaintiff have operated daycare facilities, not primary schools. Rainbow Rascals originally operated its daycare facility for children of office park employees only. It requested a variance to expand the daycare operation to include children whose parents did not work in the office park. The township granted the variance. When Shepherd Montessori initially commenced its daycare operation, it was similarly limited to children of office park employees. Eventually, Shepherd Montessori made the same request as Rainbow Rascals: to expand operations to permit children whose parents were not office park employees to use the facility. The township granted this request, just as it had for Rainbow Rascals. Thus, when Rainbow Rascals and plaintiff made the same request, defendants treated the two entities the same and granted both requests.

486 Mich at 321-322.

Daycare facilities and primary schools are not the same. Michigan licenses and regulates daycare facilities through the Child Care Organization Act, Mich. Comp. Laws 722.11 *et seq*. The state Department of Human Services oversees the operation of daycare centers.

Michigan's Department of Education enforces the state's Revised School Code, Mich. Comp. Laws 380.1 *et seq*., which regulates public and private elementary and secondary schools.

The federal government also distinguishes preschool programs from elementary schools. Head Start programs that promote school readiness are under the Office of Head Start, part of the Department of Health and Human Services. Federal programs for elementary school are the responsibility of the Department of Education.

This case cannot be compared to *City of Cleburne v. Cleburne Living Center, Inc*, 473 U.S. 432 (1985). In *Cleburne*, the city carved out facilities housing groups of mentally retarded individuals from all other communal housing arrangements. The city's justifications for the mentally retarded exception could not satisfy even the minimal scrutiny of the rational basis test. Here, in contrast, petitioner argues that the Rainbow Rascals preschool daycare is similar to petitioner's elementary school because it "involves young children and a system of learning." Petition, p. 21. At that level of generality, similarity can always be asserted and vast amounts of government line-drawing could be challenged. The Court has summarily rejected as inconsistent with rational-basis review positions far less aggressive than the one

petitioner advances. *Central State University v. American Ass'n of University Professors, Central State University Chapter*, 526 U.S. 124 (1999).

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

James J. Walsh
Counsel of Record
Bodman LLP
201 South Division Street, Suite 400
Ann Arbor, Michigan 48104
(734) 761-3780
jwalsh@bodmanllp.com

Counsel for Respondents

November 30, 2010

Supreme Court, U.S.
FILED
FEB 3 - 2011
OFFICE OF THE CLERK

No. 10-573

In the
Supreme Court of the United States

SHEPHERD MONTESSORI CENTER MILAN,
Petitioner,

v.

ANN ARBOR CHARTER TOWNSHIP, ANN ARBOR CHARTER TOWNSHIP ZONING OFFICIAL, AND ANN ARBOR CHARTER TOWNSHIP ZONING BOARD OF APPEALS,
Respondents.

On Petition for Writ of Certiorari to the Michigan Supreme Court

PETITION FOR REHEARING

ROBERT CHARLES DAVIS
ATTORNEY AT LAW
10 S. MAIN ST., SUITE 401
MT. CLEMENS, MI 48043
(586) 469-4300
rdavis@davislistman.com

Co-Counsel for Petitioner

ROBERT L. BUNTING
Counsel of Record
ATTORNEY AT LAW
P.O. BOX 7
OXFORD, MI 48371
(248) 628-5150
lciseadog@yahoo.com

Counsel for Petitioner

February 3, 2011

Becker Gallagher · Cincinnati, OH · Washington, D C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

LAW AND ARGUMENT 1

CONCLUSION 10

CERTIFICATION

TABLE OF AUTHORITIES

CASES

City of Cleburne, Tex. v. Cleburne Living Center,
473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313
(U.S.Tex.,1985) 1-5, 10, 11

Johnson v. Bredesen,
624 F.3d 742
(C.A.6 (Tenn.), Oct. 28, 2010) 1-8, 10

Mathews v. Lucas,
427 U.S. 495, 96 S.Ct. 2755 (U.S.R.I.,1976) . . 11

COURT RULES

Sup. Ct. R. 44 1

OTHER AUTHORITIES

U.S. Constitution,
14th Amendment 1, 2, 3, 10, 11

INTRODUCTION

The Michigan Supreme Court erred when it ruled that the Defendants Ann Arbor Charter Township, Ann Arbor Charter Township Zoning Official, and Ann Arbor Charter Township Zoning Board of Appeals, ("Defendants") did not violate the Equal Protection Guarantee of the Fourteenth Amendment to the United States Constitution in direct conflict with this United States Supreme Court's Opinion in *City of Cleburne v. Cleburne Living Ctr, Inc.*, 473 US 432, 87 L.Ed.2d 313, 105 S. Ct. 3249 (1985) thereby destroying Equal Protection in the State of Michigan. Left unchecked, local governments in Michigan are free to create artificial zoning categories at the expense of Equal Protection. This is alarming and requires a correction.

LAW AND ARGUMENT

Pursuant to Rule 44, a petition for rehearing is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. (**Rule 44**) On January 10, 2011, this Court issued an Order denying the Petitioner, Shepherd Montessori Center Milan's ("Petitioner"), Petition for A Writ of Certiorari. The Petitioner now timely seeks this Petition for Rehearing.

Here, the Petitioner's Petition for A Writ of Certiorari was mailed to this Court on October 28, 2010. On December 17, 2010, the United States Court of Appeals for the Sixth Circuit denied rehearing en banc related to an Opinion in *Johnson v. Bredesen*, 624 F.3d 742, 755 (C.A.6 (Tenn.), Oct. 28, 2010). The issues presented in *Johnson* demonstrates the further

erosion of *Cleburne* and illuminate the importance of this United States Supreme Court granting the instant Petition for Writ of Certiorari.

In *Johnson*, the United States Court of Appeals for the Sixth Circuit was presented with the issue of whether the Equal Protection Guarantee of the Fourteenth Amendment to the United States Constitution is violated when the franchise to vote is restored to those felons who can afford to pay their child support but not restored to those felons who cannot afford to pay their child support. Specifically, the *Johnson* plaintiffs argued that Tennessee's voter re-enfranchisement statute violates the Equal Protection Clause of the Constitution because the statute improperly conditioned the restoration of their voting rights on their ability to pay restitution and child support obligations.

> "Plaintiffs Terrence Johnson, Jim Harris, and Joshua Roberts [FN1]-all Tennessee residents and convicted felons-filed a complaint alleging that, by conditioning **restoration of their voting rights on payment of court-ordered victim restitution and child support obligations, Tennessee's voter re-enfranchisement statute violates the Equal Protection Clause of the United States Constitution**, the Twenty-Fourth Amendment, and the Ex Post Facto and Privileges*745 or Immunities Clauses of the United States and Tennessee Constitutions. In a well-reasoned decision, the district court granted Defendants' motion for judgment on the pleadings, and Plaintiffs appealed. Finding no error, we affirm."

(*Johnson v. Bredesen*, 624 F.3d 742, 744 -745 (C.A.6 (Tenn.),2010).) (Emphasis Added)

The Sixth Circuit found no violation of Equal Protection. However, Judge Moore issued a well-reasoned and lengthy dissent which, just like the Petitioner herein, cites extensively to this United States Supreme Court's Opinion in *Cleburne*. Specifically, Judge Moore cites to *Cleburne* and states aptly that the Equal Protection Clause is satisfied as long as there is a plausible policy reason for the classification and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary. In particular, Judge Moore cites to this United States Supreme Court's ruling in *Cleburne* where this United States Supreme Court ruled that the state may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.

> "[T]he Equal Protection Clause is satisfied as long as there is a plausible policy reason for the classification ... and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn*, 505 U.S. 1, 11, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) (internal citations omitted); *see* ***City of Cleburne, Tex. v. Cleburne Living*** *Ctr.*, 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) ("**The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational**."). (*Johnson* v. Bredesen 624 F.3d 742, 755 (C.A.6

(Tenn.),2010).) (Judge Moore Dissent) (Emphasis Added)

Judge Moore further cites to that portion of *Cleburne* wherein this United States Supreme Court notes that it has been suspicious of a legislature's circuitous path to legitimate ends when a direct path is available. This certainly applies to the position of the Petitioner.

> "Moreover, "[t]he Supreme Court, employing rational basis review, has been suspicious of a legislature's circuitous path to legitimate ends when a direct path is available." *Craigmiles*, 312 F.3d at 227 (citing ***City of Cleburne***, 473 U.S. at 449, 105 S.Ct. 3249)." (*Johnson v. Bredesen*, 624 F.3d 742, 757 (C.A.6 (Tenn.),2010).) (Judge Moore Dissent)

Judge Moore states that, because the Tennessee's voter re-enfranchisement statute neither burdens a fundamental right nor discriminates against a suspect class, the plaintiffs bear the burden to show that it bears no rational relationship to any legitimate government end.

> "Given these two conclusions, I must also agree that, because the Tennessee provisions neither burden a fundamental right nor discriminate against a suspect class, the Plaintiffs bear the burden to show that § 40-29-202(b) and (c) **bear no rational relationship to any legitimate government end**. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)." (*Johnson v.* Bredesen, 624 F.3d 742, 755 (C.A.6

(Tenn.),2010).) (Judge Moore Dissent) (Emphasis Added)

Judge Moore, citing to this United States Supreme Court's ruling in *Cleburne,* finds that she cannot agree that the provision restoring franchise to vote to those felons who can afford to pay their child support is rationally related to a legitimate government objective.

> "In short, I find entirely unconvincing the majority's conclusion that § 40-29-202(b) and (c) constitute a rational way to encourage Tennessee's legitimate interest in the collection of outstanding financial obligations or encourage compliance with court orders imposing such obligations. The attempt to incentivize payments that an individual is simply incapable of making by linking those payments to the right to vote, particularly when there are other *758 **collection methods available, advances no purpose and embodies nothing more than an attempt to exercise unbridled power over a clearly powerless group, which is not a legitimate state interest.** ***See City of Cleburne,*** **473 U.S. at 446-47, 105 S.Ct. 3249**." (*Johnson v. Bredesen,* 624 F.3d 742, 757 -758 (C.A.6 (Tenn.),2010) (Judge Moore Dissent) (Emphasis Added)

* * *

> "I cannot agree that the provision restoring the franchise to only those felons who are affluent enough to satisfy their child-support arrears is rationally related to a legitimate government objective, and I believe that no policy reason

> supports the distinction in the instant case." (*Johnson v. Bredesen*, 624 F.3d 742, 756 (C.A.6 (Tenn.),2010).) (Judge Moore Dissent) (Emphasis Added)

Judge Moore then aptly states that, in light of the absence of any rational purpose for the disparate treatment sanctioned, she would hold that the provision requiring the payment of child support in order to get suffrage back does not pass constitutional scrutiny because of the absence of any rational purpose for the disparate treatment.

> "In conducting a rational-basis inquiry, we "seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." *Plyler*, 457 U.S. at 216, 102 S.Ct. 2382. However, **"[r]ational basis review, while deferential, is not 'toothless.'"** *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir.1998) (quoting *Mathews v. Lucas*, 427 U.S. 495, 510, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976)). **In light of the absence of any rational purpose for the disparate treatment sanctioned by § 40-29-202(b) and (c),** as well as this United States Supreme Court's reluctance to deem rational state-imposed qualifications drawn along economic lines that inhibit the exercise of any right over which the state has a monopoly, **I would hold that the provision requiring payment of child support and restitution prior to the restoration of suffrage, regardless of an individual's ability to pay, cannot withstand constitutional scrutiny. . . .**

> The district court erred in granting judgment on the pleadings with regard to this claim, and I must respectfully dissent from the **majority's resolution of the Plaintiffs' Equal Protection Clause challenge**." (*Johnson v. Bredesen*, 624 F.3d 742, 765 - 766 (C.A.6 (Tenn.),2010).) (Judge Moore Dissent) (Emphasis Added)

Here, just like Judge Moore noted in *Johnson*, the Record is devoid of any rational purpose for the disparate treatment being imposed on the Petitioner. In the instant matter, the Record before the Michigan Supreme Court demonstrated that the Petitioner's proposed use of the same Property as a prior and permitted user was for the (faith based) education of 25 young children and would not create any different traffic concerns because the existing parking is sufficient.

> "11. Please admit that the Defendants made no finding on the record at the "**variance hearing**" indicating any traffic concerns related to the "**variance request**."
>
> **ANSWER: . . .Defendants admit that there was no discussion at the hearing on plaintiff's variance request regarding *excessive motor vehicle traffic or like problems*." (Defendants Response to Request to Admit dated May 17, 2005) (Emphasis Added)** (Pet. App. U at 232a-233a)
>
> "8. Please admit that the Defendants made no finding on the record at the "**variance**

> **hearing**" indicating any parking concern related to the "**variance request**."
>
> **ANSWER: . . . Defendants admit that the issue of motor vehicle *parking* was not discussed during the hearing on plaintiff's variance application." (Defendants Response to Request to Admit dated May 17, 2005)** (Pet. App. U at 232a)

Here, the Record before the Michigan Supreme Court was clear that the Petitioner's proposed use has no demonstrated health, safety or sanitation concerns different from the prior use of Rainbow Rascals.

> 12. Please admit that the Defendants made no finding on the record at the "**variance hearing**" indicating any ***sewage*** concern related to the "**variance request**."
>
> **ANSWER: Defendants admit that there was no discussion of *sewage* at the hearing on plaintiff's variance request.**
>
> 13. Please admit that the Defendants made no finding on the record at the "**variance hearing**" indicating any ***fire*** concern related to the "**variance request**."
>
> **ANSWER: Defendants admit that there was no discussion of any *fire* concern at the hearing on plaintiff's variance request." (Defendants Response to Request to Admit dated May 17, 2005) (Emphasis Added)** (Pet. App. U at 233a)

Nowhere in the Record before the Michigan Supreme Court was there one scintilla of evidence indicating that the use desired by the Petitioner poses a public health concern different from the prior use by Rainbow Rascals.

> "10. Please admit that the Defendants made no finding on the record at the "**variance hearing**" indicating any ***public health concern*** related to the "**variance request.**"
>
> **ANSWER: Defendants admit that there was no discussion of *public health concerns* at the hearing on plaintiff's variance." (Defendants Response to Request to Admit dated May 17, 2005) (Emphasis Added)** (Pet. App. U at 232a)

The Record before the Michigan Supreme Court provided no indication of any articulated concern or reason for denying the Petitioner's proposed Property use. There was no Record evidence of a rational purpose for the Defendants disparate treatment of the Petitioner. The Record before the Michigan Supreme Court is clear that the Property use requested by the Petitioner had no alleged or demonstrated detrimental impact on the land, environment, water, sanitation, traffic or any other aesthetic concern. (Pet. App. U, 228a-244a)

There is no dispute here that the Petitioner and the prior approved user, Rainbow Rascals, were similarly situated in all relevant respects. There is even less dispute that the governmental decision makers treated the Petitioner and Rainbow Rascals entirely differently. The difference in treatment cannot be

more drastic. The Petitioner was absolutely prohibited from using the Property for 25 children and Rainbow Rascals was absolutely allowed to use the exact same Property for 100 children. Just as in *Cleburne*, the Record is clear that there is no rational reason for treating the Petitioner's proposed use differently. In conflict with *Cleburne*, the Michigan Supreme Court ruled that the Petitioner was not treated differently from a similarly situated entity despite the fact that the Record did not reveal that the Petitioner's proposed use threatened any legitimate interest of the Defendants in a way that Rainbow Rascals previously permitted use would not. The Michigan Supreme Court has rejected *Cleburne* and eroded Equal Protection in Michigan.

Alarmingly, however, the current erosion of *Cleburne* and of Equal Protection does not end in Michigan. As noted above, the United States Court of Appeals for the Sixth Circuit's recent ruling in *Johnson* demonstrates a further erosion of *Cleburne* and of Equal Protection.

CONCLUSION

The Michigan Supreme Court's published Opinion affects every citizen in the great State of Michigan. The Michigan Supreme Court's Opinion allows the State, local governments and related State agencies to treat similarly situated entities differently based solely on the lines drawn in the zoning ordinances which often are riddled with biases, prejudices and unsupported wishes of local officials.

The Michigan Supreme Court's ruling directly conflicts with *Cleburne* and blesses local governments

with impunity to make any arbitrary classification they choose for the uses of properties. Local governments are free to make any classification they choose without any fear of violating Equal Protection.

Without this United States Supreme Court's intervention, municipalities in Michigan are free to treat similarly situated entities differently without any evidence of a rational reason for the disparate treatment in direct contravention of *Cleburne*. This is not what the framers of the 14th Amendment intended. From henceforth, municipalities in Michigan can choose to treat similarly situated entities differently without any fear of violating Equal Protection. Today, a Montessori school was treated disparately without any reason stated on the record for the disparate treatment. Tomorrow, a Catholic school may seek to use a location previously used by a Lutheran school and the municipality will be free to say no without the need to show any rational reason for the disparate treatment. This is wrong and an insult to the Fourteenth Amendment.

As this Court ruled long ago, the rational basis test may be deferential but it is not toothless.

> "**Finally, while the scrutiny by which their showing is to be judged is not a toothless one,** E. g., Jimenez v. Weinberger, 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974);" (*Mathews v. Lucas*, 427 U.S. 495, 510, 96 S.Ct. 2755, 2764 (U.S.R.I.,1976).)

The Michigan Supreme Court's ruling is a klaxon sounding loudly and warning of the erosion of *Cleburne*.

For the reasons stated above, the Petitioner respectfully requests that this United States Supreme Court grant the Petition for Rehearing and grant Petitioner its previously submitted Petition for a Writ of Certiorari.

Respectfully submitted,

ROBERT L. BUNTING
Counsel of Record for Petitioner
Shepherd Montessori Center, Milan
P.O. Box 7
Oxford, MI 48371
Telephone (248) 628-5150
lciseadog@yahoo.com

Robert Charles Davis
Co-Counsel for Petitioner
Shepherd Montessori Center Milan
10 S. Main St., Suite 401
Mt. Clemens, MI 48043
Telephone (586) 469-4300
Facsimile (586) 469-4303
rdavis@davislistman.com

CERTIFICATION UNDER RULE 44

Attorney Robert L. Bunting certifies that pursuant to Rule 44, the grounds for this Petition for Rehearing are restricted to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented in the Petition for Writ of Certiorari and that this Petition for Rehearing is presented in good faith and not for delay.

Respectfully submitted,

Robert L Bunting /ac

ROBERT L. BUNTING
Counsel of Record for Petitioner
Shepherd Montessori Center, Milan
P.O. Box 7
Oxford, MI 48371
Telephone (248) 628-5150